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CIVIL RIGHTS ACT OF 1984

HEARING

BEFORE THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 2568

TO CLARIFY THE APPLICATION OF TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, SECTION 504 OF THE REHABILITATION ACT OF 1973, THE AGE DISCRIMINATION ACT OF 1975, AND TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

JUNE 26, 1984

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CONTENTS

STATEMENTS

TUESDAY, JUNE 26, 1984

Page
American Hospital Association, prepared statement 311
Baptist Joint Committee on Public Affairs, prepared statement 283
Chavez, Linda, Executive Staff Director, Commission on Civil Rights 8
  Prepared statement 11
Days, Drew S., III, professor, Yale Law School 147
  Prepared statement 150
Epstein, Richard L., senior vice president, American Hospital Association, accompanied by Stuart M. Gerson, counsel to American Hospital Association 111
  Prepared statement 113
Feistritzer, Emily C., author of the Carnegie Foundation State-by-State Study of Teachers 199
  Prepared statement 202
Fields, C. H., representing the American Farm Bureau Federation, prepared statement 257
Fried, Charles, professor of law, Harvard University 27
  Prepared statement 30
Fryer, Jerry C., prepared statement 287
Grassley, Hon. Charles E., a U.S. Senator from the State of Iowa, prepared statement 6
Hafen, Bruce C., president, Ricks College, and president, American Association of Presidents of Independent Colleges and Universities 50
  Prepared statement 52
Hecht, Hon. Chic, a U.S. Senator from the State of Nevada, prepared statement 234
Hooks, Benjamin L., chairman, Leadership Conference on Civil Rights, and executive director, National Association for the Advancement of Colored People 137
  Prepared statement 140
Javits, Jacob K., prepared statement 172
Jones, Roy C., director of legislative affairs, Moral Majority, Inc., prepared statement 261
Krebs, Frederick J., Director, Employer Relations Section, U.S. Chamber of Commerce, accompanied by Mark A. De Bernardo, Manager of Labor Law Section 186
  Prepared statement 188
McEwen, William S., director, equal opportunity affairs, Monsanto Co., and chairman, human resources steering group, National Association of Manufacturers 173
  Prepared statement 177
Motley, John J., III, director of Federal legislation, National Federation of Independent Business 191
  Prepared statement 192
Murren, Philip J., attorney at law, partner in Ball & Skelly, Harrisburg, PA, representing Association of Christian School International 215
  Prepared statement 271
National Association of Counties, prepared statement 247
Newton, Hugh C., and Associates, prepared statement 296

Page

Pendleton, Clarence M., Jr., Chairman, U.S. Commission on Civil Rights, prepared statement 23
Roche, George, Hillsdale College, prepared statement 298
Thurmond, Hon. Strom, a U.S. Senator from the State of South Carolina, prepared statement 7
Wiggins, Norman, president, Campbell University, prepared statement 390
Winstead, McGuire, Sechrest & Minick, prepared statement 278
Zwiebel, David, director of Government affairs, Agudath Israel of America, representing Rabbinical and Talmudic schools 210
  Prepared statement 211
  Additional statement 230

ADDITIONAL MATERIAL

Communications to—
  Garn, Hon. Jake, a U.S. Senator from the State of Utah, from Lincoln C. Oliphant, counsel, Republican Policy Committee, June 14, 1984 (with attachment) 353
  Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah, from:
    Eklund, Carolyn N., vice president, Utah Hospital Association, July 11, 1984 255
    Falwell, Dr. Jerry, president, Moral Majority, June 15, 1984 387
    Ford, Ford B., Under Secretary of Labor, June 25, 1984 314
    Hecht, Hon. Chic, a U.S. Senator from the State of Nevada, June 12, 1984 253
    Hoye, Msgr. Daniel F., General Secretary, United States Catholic Conference, June 11, 1984 388
    Lyng, Richard E., Acting Secretary, Department of Agriculture, June 20, 1984 384
    McConnell, Robert A., Assistant Attorney General, Office of Legislative and Intergovernmental Affairs, U.S. Department of Justice, May 24, 1984 317
    Motley, John J., III, director of Federal legislation, National Federation of Independent Business, June 12, 1984 249
    National Association of Counties, June 11, 1984 247
    Nickles, Hon. Don, a U.S. Senator from the State of Oklahoma, June 12, 1984 (with enclosures) 241
    Symms, Hon. Steve, a U.S. Senator from the State of Idaho, June 12, 1984 254
  Helms, Hon. Jesse, a U.S. Senator from the State of North Carolina, from:
    Ervin, Sam J., Jr., May 24, 1984 246
    Oliver, Daniel, General Counsel, U.S. Department of Agriculture, June 8, 1984 250
  Nickles, Hon. Don, a U.S. Senator from the State of Oklahoma, from Albert D. Bourland, June 12, 1984 248
Questions and answers:
  Responses of Mr. Epstein to questions submitted by Senator Hatch 125

CIVIL RIGHTS ACT OF 1984

TUESDAY, JUNE 26, 1984

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 2:10 p.m. in room 430, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the committee) presiding.

Present: Senators Hatch, Metzenbaum, Denton, Kennedy, Nickles, and Grassley.

Staff present: Dr. Howard Matthews, majority professional staff.

OPENING STATEMENT OF SENATOR HATCH

The CHAIRMAN. Today's hearing has been organized in response to the many individual witnesses and organizations who have asked for an opportunity to share with the committee and the Congress their assessments of the impact of legislation now actively pending before this committee, S. 2568, the Civil Rights Act of 1984.

As is usually the case when considering controversial legislation, we are faced with a larger number of witnesses desiring to testify than there is an adequate supply of time in which to hear them do so. For this reason and this reason alone, many citizens who have asked to appear but who cannot be with us today will submit their testimony in writing as part of the formal Senate hearing record. These include several prominent scholars of the law, Members of Congress, and leaders of civic and religious organizations.

Without objection, I will keep the committee's record open until this Friday in order that their written testimony may be included with our final report.

It is fair to say that some who support S. 2568 are convinced that it should become the law of the land without changing so much as a punctuation mark. However, there is a growing number who I believe have more carefully studied the law and the report of the House committee and who are asking that we slow down the mad rush to pass this legislation long enough to examine it and correct its deficiencies.

Characteristic of those who have contacted me both by telephone and in written communication is Dr. Bernard Fryshman, executive director of the Association of Advanced Rabbinical and Talmudic Schools. This association, as I understand it, represents about 800 schools across the Nation.

In a letter I received a few days ago, Dr. Fryshman writes:

> Dear Senator Hatch, I am writing you with respect to the Civil Rights Act of 1984, S. 2568.
>
> When the Civil Rights Act of 1984 first came to my attention, the language of the bill seemed innocuous enough, and the stated intent of the sponsors of the legislation seemed laudable enough that I felt comfortable recommending to my colleagues that no action was necessary, and that Congress would see to its speedy implementation.
>
> I first began to realize how wrong I was in my evaluation of this bill when I learned of the testimony of Assistant Attorney General Reynolds. Further investigation and review of the testimony of several other groups has led to the realization that the bill might have some very serious—and negative—implications.
>
> So much so that I am writing to ask that you use your good offices to try to provide additional time for a more careful evaluation of all the implications of this proposed legislation and any amendments that may be offered thereto.
>
> Signed, Dr. Bernard Fryshman. And that's the end of his letter.

To Dr. Fryshman's words can be added the voices of countless others who are troubled by the ambiguities in this particular bill.

This committee has scheduled a markup of this bill for tomorrow. I want to get the bill out of committee and to the floor of the U.S. Senate, where others, who may have amendments that will not be considered tomorrow, will have an opportunity to propose those amendments, or at least be prepared to explain to the voting constituency represented by the witnesses today and at previous hearings why there was such a big hurry to enact this particular bill and why they were unable to give it the thoughtful consideration people are pleading with me to give this bill.

I said before, as I say again now, that we need to do what the Congress should have done in the first place when title IX was drafted. That is, we need to pass legislation that does not ask more questions than it answers. We need to make certain that we are not sending out a message that we will give carte blanche to the regulation writers and the half a thousand Federal courts to decide the meaning of such terms as "recipient," "indirect aid," "transferee," and other legislative terms that are less than clearly defined.

I also want to make it unmistakably clear today that in the full committee markup tomorrow, on June 27 of this year, there are two major items of business to be taken up: the nomination of Mrs. Rosemary Collyer as general counsel for the National Labor Relations Board; and this legislation, S. 2568. These items of business will be taken up in that order.

It is no secret that initially I had some reservations about title IX. And in fact, I was the principal sponsor of a bill to make specific changes in title IX. But just like Dr. Fryshman, I studied the law and its ramifications, and I changed my mind.

I also took time to meet with and listen to women's groups and other civic association leaders who were more expert and informed on the subject of title IX than I. Then, before it became widely fashionable to do so, I became a "born-again" supporter of title IX and rescinded my original bill. And I acknowledge that title IX has done a lot for women in our society.

It is in this spirit that I observe that not everyone who has had an honest difference of opinion on what S. 2568 would do is automatically wrong, nor are they automatically unenlightened on the subject of civil rights for women or anyone else.

I would hope that the sponsors of S. 2568 and those who argue for no amendments cherish, as much as I do, the fundamental responsibility of all people of goodwill to respect the differing opinions of others and to avoid the tendency to label their opponents with the broad brush of reaction and ignorance.

As you know, I support title IX. The record of previous hearings on this bill will show that I advocate legislation which, in President Reagan's words, would "prevent discrimination against women in educational institutions that are getting funds from the Federal Government."

We all acknowledge that in the academic community, as in our country at large, there is clear evidence of women being accorded less than equal opportunity, a form of injustice which every responsible legislation has an implicit responsibility to help correct.

If this bill would do that, and if it would simply return us to those days before the *Grove City* decision was rendered, this hearing and others like it would not have been necessary.

In the considered judgment of many legal scholars, S. 2568 goes far beyond the modest claims of its advertising. In the minds of the attorneys and students of Government in the organizations and associations represented here today. S. 2568 portends inordinate governmental intrusion into the ordinary day-to-day affairs of the people they represent.

Again, I am very pleased to welcome the witnesses here today. Because of the press of Senate business, some members of the committee will only be able to be here for a portion of this hearing. For that reason, it is likely that some of the Senators may want to submit questions to you witnesses in writing for the inclusion of the record of this hearing. When this is the case, I would urge that you respond as quickly as possible so that we may make the record of this hearing available to the public with a minimum of delay.

Because of the limited time available to witnesses to prepare for this hearing, it is impossible for all of the witnesses to submit a written copy of their testimony. For that reason, some witnesses will be speaking extemporaneously or from an outline or notes.

Our standard operating procedure is for us to have each witness take about 5 or 6 minutes to summarize his or her statement, following which members of the committee will no doubt have some questions. And so we would like to limit all witnesses to 5 minutes. And we have the lights right there on the desk. When the green light goes on, you have 5 minutes; when the yellow light goes on, you have 1 minute more. When the red light goes on, I would appreciate it if you will end your testimony upon the lighting of the red light.

I will introduce our witnesses in a minute. We have Senator Metzenbaum with us, and, Senator, we will turn the time to you at this time.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. Thank you, Mr. Chairman.

Mr. Chairman, it is doubtful that this committee has considered a piece of legislation this session of more importance than the Civil Rights Act of 1984, for although this bill merely seeks to restore the civil rights law to its pre-*Grove City* status, it represents a critical test of the commitment of this committee and the overall committee and the Senate to the rights of minorities, women, and the disabled in our society.

The *Grove City* decision has left us with an interpretation of civil rights laws which threatens to undermine progress we have made over the last 20 years in eliminating the scandal of discrimination from American life.

Title IX, for example, before this law was passed, discriminated against women in professional schools, vocational schools, universities and colleges—and I want to correct what I stated because title IX did not discriminate against them, but discrimination against women in professional schools, universities, and colleges was not only widespread but it was legal.

Since its passage in 1972, title IX has been the major force behind rapid gains in equal opportunity achieved by female students and employees in educational institutions across the Nation.

And it is not only title IX which will be seriously undermined if we allow the *Grove City* decision to stand. Title VI of the Civil Rights Act banning racial discrimination, section 504 banning discrimination against the handicapped, and the Age Discrimination Act of 1975 will all be affected by the decision.

Do we really want to turn the clock back in all these areas? Do we want to go back to the time when the Federal Government granted $37 million over 16 years to 89 racially segregated medical facilities, when Federal funds supported desegregation in libraries, schools, hospitals, and hundreds of other programs and institutions?

We cannot forget, as Dr. Mary Berry stated so well in her testimony before the House Judiciary and Education and Labor Committees, that blacks were unable to vote, were excluded from restaurants and motels, were restricted in their housing choices, and denied the benefits of many programs.

Title VI has been a tool to provide justice. By 1970, the Department of Health, Education, and Welfare was involved in proceedings against approximately 600 school districts for failure to develop and implement desegregation plans.

As a result of vigorous enforcement, the number of black students in 11 Southern States, in schools which were majority white, increased from 1 percent in 1964 to 39 percent in the 1970–71 school year. Hospitals were required to treat black patients as well as white.

Prior to that, we heard too many tragic stories of black patients dying because they were denied medical treatment due to their skin color.

Today, blacks are graduating from colleges and universities which formerly refused to admit them. As Joseph Rauh has stated, title VI broke the back of segregation, and as he reminded us, it is not all gone yet.

And what about the handicapped? Do we really want to repeal all the progress which has been made in granting disabled Americans access to housing, employment, and education? Since 1977, for example, the number of disabled freshmen in American universities has more than doubled. In my own State, at Ohio State University, where in 1975 there were 32 disabled students, in 1984 there were 662.

Are we really prepared, and do we want, to reverse that trend? Are we going to ignore the existence of the stereotype of the senior citizen in our society which inevitably leads to age discrimination? These are the kinds of questions we must ask ourselves. Congress recognized in passing all of these laws that nothing short of a broad ban on discrimination would guarantee the American people that their tax dollars would not go to recipients who willfully ignored the civil rights of minorities, women, the disabled, and the elderly in our society.

The bill before us merely seeks to restore that broad ban on discrimination which existed before the *Grove City* decision. And we should and must pass this legislation. The administration, while claiming to support the purpose of the bill, has hidden behind the argument that the bill extends antidiscrimination protection above and beyond that which existed prior to *Grove City*. To that, we say, "No way." When asked to provide their own language to remedy this alleged overreach, the Department of Justice refused, which can only lead us to speculate as to the real reasons which lie behind the administration's opposition to this bill.

This administration has been no ally when it comes to civil rights enforcement. Quite the opposite. We had the administration seeking to extend tax-exempt status to Bob Jones University and other schools that practice racial discrimination. They opposed the extension of the Voting Rights Act until its passage was imminent. The Department of Justice has filed only six lawsuits against alleged violators of the Fair Housing Act, compared with an average of 32 suits per year from 1969 to 1978.

The Department of Justice has not filed a single suit dealing with segregation in elementary and secondary education. The number of equal opportunity suits brought by the administration has declined more than 70 percent compared with the number brought by the Carter administration. The administration wants fair housing cases to be decided in court rather than through administrative enforcement, thus prolonging the settlement process and adding to the case backlog.

Mr. Chairman, the administration has a golden opportunity to correct the direction of its civil rights policies by getting behind this bill, which now has 63 cosponsors, Democrats and Republicans alike. The ball is in the administration's court.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Denton.

OPENING STATEMENT OF SENATOR DENTON

Senator DENTON. Thank you, Mr. Chairman.

I for one applaud your leadership and insistence that the committee probe the ultimate effects of the proposed Civil Rights Act of 1984, S. 2568. I know that you are under great pressure to allow this complex piece of legislation, about which we know quite little, to be sent to the Senate floor for a vote. I thank you for preserving for us the opportunity for further scrutiny of the bill and for careful consideration of its implications.

S. 2568 does raise many questions of public policy. There is currently no comprehensive analysis to help us find answers to those questions. I firmly believe that adage "Haste makes waste" applies most appropriately to the issue before us.

I believe that this only day, this sole day of hearings, at the full committee level will not be sufficient to fill the void in the legislative history of the Civil Rights Act of 1984. And I am deeply troubled that the bill has been placed on the agenda for tomorrow's markup in executive session with the full committee. I am confident that many other members agree that we will not have enough time between today and 9:30 a.m. tomorrow to read and study carefully enough the testimony presented here. The issue requires full and careful study, deliberation, and debate, without which the act of uninformed voting would be negligent.

I sincerely hope that we will be able to save ourselves a great deal of embarrassment by delaying the vote on the Civil Rights Act of 1984 until a later date. As you mentioned, there are some of us who must depart today, but I do look forward to hearing some of the testimony from our distinguished panel of witnesses. I shall read the rest later, and indeed I shall be one who will be submitting questions in writing.

Thank you, Mr. Chairman.

The **CHAIRMAN**. Thank you, Senator.

At this time we will receive for the record the prepared statements of Senator Grassley and Senator Thurmond.

[The prepared statements of Senators Grassley and Thurmond, follow:]

PREPARED STATEMENT OF SENATOR GRASSLEY

Senator **GRASSLEY**. Mr. Chairman, I appreciate the opportunity to hear from our distinguished panel of witnesses this afternoon on S. 2568, the Civil Rights Act of 1984. There have been a number of concerns raised in the last few months on the scope of this bill, which is directed at overturning the Supreme Court's February 28 decision in *Grove City* v. *Bell*. In *Grove City*, the court held that a college that accepts students who receive Federal financial aid is subject to title IX of the education amendments of 1972 only in the administration of its financial aid program. The court rejected the argument that the entire recipient institution could be the "program or activity" and therefore be regulated in its entirety.

Of course, S. 2568 goes much further than overturning the restrictive interpretation of the Supreme Court regarding title IX enforcement, but would also enact major changes to three other significant civil rights statuties—Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975.

Sponsors of the bill claim that S. 2568 is a simple corrective measure, not a sweeping revision of civil rights law. I do not doubt the intentions of its sponsors, nor of my many colleagues who have signed on subsequently as cosponsors of the bill. However, I do feel that it is clear that this measure makes changes that expand the Federal role in civil rights enforcement. And furthermore, I feel that it is the responsibility of this committee to make reasonable inquiries and give careful attention to the ramifications of this bill.

The Justice Department has claimed that S. 2568 contains serious constituitonal implications and may lead to interference with important State prerogatives. We need to examine these serious constitutional issues, as well as the serious policy issues that arise from this legislation in its present form. Attention should be given to ensure that the term "recipient" is not more sweeping than Congress' intends. We must be wary of creating overlapping regulation and monitoring by every Federal agency. And we must carefully examine the impact this bill would have on all segments of the private sector—from industry to farmers, educators and landlords.

There is no question that the members of this committee are dedicated to the objectives of title IX, and of the other civil rights statutes affected by this bill. And I think that it is possible to enact legislation which would accomplish the goal of institution-wide application of title IX, which existed prior to the *Grove City* decision.

However, we must do so by drafting language which is not broad and ambiguous, but rather specific and corrective. Congress, and not the courts, should decide the implications of any changes to our civil rights laws.

Mr. Chairman, as a member also of the Senate Judiciary Committee, I have had the chance to participate in earlier oversight hearings on this bill. I welcome another opportunity to gain input on the measure and look forward to the testimony of these outstanding witnesses.

PREPARED STATEMENT OF SENATOR THURMOND

Mr. Chairman, it is a pleasure to be here today to consider S. 2568, the proposed "Civil Rights Act of 1984".

I highly commend you, Mr. Chairman, for scheduling this hearing, and two earlier hearings in the Constitution Subcommittee of the Judiciary Committee, to consider this legislation. Few laws are more important than those which protect the civil rights to our citizens, and, as you have recognized, legislative efforts to amend those laws, such as S. 2568, must undergo thorough and critical analysis. Because I strongly believe that such an analysis can best be made if all committees with jurisdiction over the legislation are involved, I recently requested your assistance and the assistance of the ranking minority member, in gaining approval for sequential referral of S. 2568 to the Judiciary Committee. I am still hopeful that this can be achieved.

Mr. Chairman, since the Supreme Court decided the *Grove City* case earlier this year, many or our colleagues, and others have called for reversal of the Court's narrow interpretation in that case of the "program or activity" language found in Title IX of Education Amendments of 1972. While I personally would not go so far as to label as flawed, as some have, the reasoning used by the Supreme Court in this case.

There appears to be widespread support in Congress, and by the administration for the "institution wide" approach to envoking coverage under the civil rights statutes.

However, the statements that have been made by the proponents of S. 2568 regarding its intended effect, and the language of the bill itself appear to contain major inconsistencies. While the proponents speak of returning to the pre-Grove City state of the law, their bill, on its face and according to many who have testified prior to today, goes far beyond even the broadest reasonable interpretation of the law as it currently exists.

Mr. Chairman, I believe that it is the responsibility of Congress to pass legislation which, to the greatest degree possible, reflects the intent of Congress. The sponsors of S. 2568 have introduced a very broad, nearly all encompassing statute, and seek to limit its scope only through statements and presumably, committee report language. This is no way to legislate.

I, therefore, believe it is time that the sponsors of the so-called "Civil Rights Act of 1984" revise the language of their proposal to conform to their stated intent. On the other hand, if their real intent, as represented in the provisions of S. 2568, is to achieve a greatly broadened scope of coverage under the civil rights laws, then I believe they should so state.

I want to welcome the distinguished witnesses who will testify today and I look forward to their testimony.

The CHAIRMAN. Our first witness for today is Linda Chavez, Executive Staff Director of the Commission on Civil Rights.

As some of you know, Linda testified on S. 2568 at a hearing before the Judiciary Committee a short time ago. Because her well-reasoned analysis is based on actual experience in the field, rather than from a theoretical construct of the bill, I have asked her to share her views with members of this committee who were unable to participate in the earlier hearing.

Joining Ms. Chavez will be Mr. Charles Fried, professor of law at Harvard University. Professor Fried also testified at one of the two hearings in the Judiciary Subcommittee.

After this panel has completed testifying, I will have a few questions which I would like to direct at each witness. All of today's witnesses will be called up in panels. I would hope that each would feel free to comment on the questions that are directed at any or all other witnesses on their panel.

Again, it is really good to have both of you back to help us better understand this complex issue.

Ms. Chavez, will you go first? We would like to then hear from Professor Fried, after which we will entertain questions from the committee.

Please proceed.

STATEMENT OF LINDA CHAVEZ, EXECUTIVE STAFF DIRECTOR, COMMISSION ON CIVIL RIGHTS

Ms. **Chavez**. Thank you very much, Senator.

I would like to ask that the testimony of Chairman Pendleton and myself be submitted for the record. That was the testimony we delivered before the Judiciary Committee.

The **Chairman**. Without objection, we will put it in the record.

Ms. **Chavez**. I would like to take just a few minutes this afternoon to go over orally some of the main points of that testimony.

First of all, I think it's important for the committee to understand that the U.S. Commission on Civil Rights has not had an opportunity to review this particular bill or any other bill that would amend the civil rights statutes. However, shortly after the Supreme Court decision in *Grove City* vs. *Bell,* the Commission did meet and did adopt a policy statement on legislation to amend the civil rights statutes. The various points of that policy statement were that the Commission endorsed the general principle of broad institutionwide coverage and urged Congress to amend the Civil Rights Act title VI, title IX of the Higher Education Act, section 504 of the handicapped provision, and also the Age Discrimination Act.

And the Commission called upon Congress to amend those statutes in order to return them to a pre-*Grove City* broad institutionwide coverage interpretation.

In addition to that broad policy statement, the Commission also reiterated its position that the pinpointing provision of fund termination be maintained as it was defined in section 602 of title VI and section 902 of title IX.

In addition to that, the Commission reiterated its position on nondiscriminatory affirmative action, and finally suggested that there were other funding statutes that were in fact affected by the *Grove City* decision and that Congress ought to at the very least take a look at those funding statutes to determine whether or not they also needed to be amended.

Although the Commission was not able to take a look at this bill, the staff of the Civil Rights Commission has analyzed the bill and has raised a number of concerns, which I would like to present to you this afternoon.

They cover two basic areas. One is in the area of coverage, and the other is in the area of scope of fund termination.

The concerns, in part, stem from some ambiguities in the language of the bill. For instance, the definition of "recipient" in the bill includes, "States, instrumentalities of States, public agencies, and subunits of States." Our questions have to do with what this would mean in the actual enforcement. And we have cited in our testimony the example of a State which received a categorical health grant for its health department. Our question is, "Would the State Government itself be the 'recipient,' thereby subjecting all of its activities to the four civil rights laws, or is the recipient only the State health department?"

And one could use other examples as well. If, for example, a physics department of a branch of a State university system received Federal education aid, is the entire State university the recipient, or is it the physics department; and in fact, what would that mean in terms of interpretation?

The other area in terms of the definition and the scope of coverage under the bill has to do with the noneducation activities of the recipient. Under the old interpretation prior to *Grove City,* no court and the Federal agencies did not in fact envision the law to include the noneducation commercial activities of a recipient. For example, if a university owned housing and accrued income from that housing and that housing was not rented either to faculty or to students, but nonetheless did provide income, it was never envisioned that that particular housing was in fact covered. But under the plain language of this bill, it would see that all activities would be covered and in fact the commercial activities, noneducation-related, would in fact be covered under this definition.

The definition is also modeled on current regulations, but it does contain a significant clause, one of which is, "which receives support from the extension of Federal financial assistance to any of its subunits." We are again concerned about what this means, and we have cited an example of a fire department. If, for example, a municipal fire department receives a Federal grant, is the recipient then only the fire department; or because the fire department goes out and conducts routine tests of the municipal buildings, is the entire city government covered? And what exactly would this mean in the final analysis?

In terms of the termination of funding, again this is one area where the Civil Rights Commission did take a specific position, and that position was to retain the current pinpointing language in section 602 of title VI and 902 of title IX. It would appear that because of language included in this legislation, specifically that would terminate the--pardon me—that would pinpoint the termination to the effects that were--to the particular assistance which supports the noncompliance. And again, the word "supports" is crucial, and our concern is that that again would be significantly broader.

In addition to these general concerns, we have concerns about other statutes that would be affected by these changes. One is the Revenue Sharing Act. And here we are concerned because the Revenue Sharing Act has in it a particular specific language relating to programs which receive Federal assistance under the act. And what we are concerned about is that there is a provision in that law which says that local government which can show that by clear and convincing evidence that payment under the chapter is not used to pay for any part of the program or activities which may then be found in discrimination, that this is considered a rebuttable presumption and that the proviso does in fact allow local governments to show that funds were not used to support the actual activity which may be found discriminating, and therefore funds could not be cut off to the entire locality but only to the program found in discrimination.

Finally, I would like to just conclude by suggesting that in addition to what I have described as somethat broadening effects of the bill, there are other effects which may in fact lead us to a more narrow interpretation of the law, and certainly narrower than we've had under the pre-*Grove City* decision.

One of those is that the term "individuals" does not appear in the act, and therefore individuals do not appear to be covered under the act.

Another problem is that educational programs not in education institutions would not be covered. And for example, a State prison that had a vocational education program would not necessarily be covered under the act. If, in fact, it was covered, however, one would have to question whether in addition to the education programs, coverage would extend to the entire State prison system and might affect, for example, such things as the determination of how one goes about choosing prison guards. The requirements under tests, for example, which could have a disparate impact on minority persons.

And finally, the legislation does not at all touch funding statutes which do have program-specific language and which may also need to be changed if we want to affect the coverage of the bill.

Congress, we believe, should write as clear and precise a bill as possible. I think that it would be unfortunate if we left up to the courts to determine what the bill meant, and I think we have a recent Supreme Court decision in the *Staats* case which shows that it can take 20 years for the courts to finally determine what Congress meant. In the *Staats* decision, you had 15 years of litigation trying to litigate what title VII meant and what certain provisions in that law meant. And it took 20 years to try and figure out that Senator Humphrey meant what he said when he guaranteed that the law under title VII would not require racial preference in any programs.

I guess I might just conclude by suggesting that it would be unfortunate if Congress were to end up sounding like J. Alfred Prufrock in the poem by T.S. Eliot, muttering forever, "That's not what I meant. That's not what I meant at all."

Thank you.

[The prepared statements of Ms. Chavez and Chairman Pendleton follows:]

TESTIMONY OF LINDA CHAVEZ
STAFF DIRECTOR OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS
BEFORE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

May 30, 1984

Thank you, Mr. Chairman. I am pleased to have the opportunity to present to you some of the issues identified by the Commission's staff in reviewing S. 2568. I will first express some general concerns about the bill and then I want to raise specific issues that need to be considered.

General Comments on S. 2568

S. 2568 would amend not only Title IX but also three other cross-cutting civil rights statutes. The Commission supports this general approach. We think it is crucial to bear in mind, however, that Title IX's coverage, even in broad form, applies only to educational entities or settings. Title VI, Section 504 and the Age Discrimination Act cover all federally-assisted entities and programs. The Congress, in amending these four statutes, should consider how the language of the amended statutes would operate where funding programs, types of recipients, and their service and benefit delivery may be quite different from those in the traditional education setting. While the Grove City opinion involved a college recipient and student financial aid programs, there are hundreds of widely different funding programs administered by nearly 30 major federal agencies, many different kinds of recipients, and many different services and benefits dispensed.

We stress this because we believe the Congress should take special care to be as clear as possible as to how the amended statutes would confer regulatory jurisdiction and provide the basis of private suits in a variety of circumstances, and how the fund termination power should be construed A lack of such clarity in the current laws as to the meaning of the phrase "program or activity" has created the problem of narrow coverage that now must be corrected. Because these statutes encourage voluntary compliance, clarity in the scope of recipients' obligations is especially important. Not only recipients but participants in federally aided activities have an overriding interest in as clear a bill as you can produce. Moreover, there are numerous enforcement officials and Federal judges who need to be certain of the meaning of the laws they must enforce.

Ambiguities in S. 2568

Our staff has tried to apply the statutes, as they would be amended by S. 2568, to a number of circumstances to determine how they would operate. In doing so, it appears that the bill might create some ambiguities in the scope of such amended statutes. If S. 2568 is adopted, we believe some of its language needs clarification so that congressional intent as to the scope of these statutes is clear. I would now like to discuss two general areas, coverage and fund termination.

How Broad is the Definition of "Recipient" and What is the Extent of A Recipient's Compliance Obligations?

The bill's definition of "recipient" includes states, instrumentalities of states, and public agencies, including subunits of states. It is not entirely clear what entity would be the recipient in various circumstances. For example, if a state receives a categorical health grant for its health department, is the state government itself the recipient, thereby subjecting to the civil rights laws all activities of the state government, including the state prison system and state professional licensing activities? Or, is the recipient the state health department? If it is the former, we are not aware that pre-Grove City coverage had ever been so extended in that fashion. If the entire state is covered under these circumstances, the regulations enforcing these statutes are also applicable to the entire state. These regulations use an "effects" test rather than the "intent" test, which is generally used under the Constitution in determining whether discrimination exists. The same coverage questions arise under block grant programs as well.

There is also a question of the scope of a recipient's compliance obligations. For example, under the broad coverage of Title IX thought to exist prior to Grove City, all educational activities of a college would have been subject to Title IX by virtue of the receipt of student financial aid and similar educational aid. It is not entirely clear, however, that by virtue of receiving educational aid, a college's commercial activities, unrelated to the educational activities of the college but providing revenue to the college, would have been covered by Title IX. Under S. 2568, such activities would seem to be covered. Thus, a college's rental property, even if not occupied by students or faculty, would seem to be covered by Title IX under the bill, in addition to the college's faculty housing and student dormitories. Similarly, under the bill, it appears that educational aid to a college would also subject the college's non-educational, commercial activities, such as the renting of commercial or housing space to non-students and non-faculty, to the requirements of Title VI, the Age Discrimination Act and Section 504. In the case of Section 504, for example, the requirement to make facilities accessible would appear to apply not only to dormitories and classroom buildings, but also to these other properties as well.

The bill draws its definition of "recipient" from existing agency regulations. Unlike the regulations, the bill's definition does not include the word "individual" or "person." The absence of the word "person" from the definition of recipient could reduce the scope of coverage of the statute. If a person, not incorporated as a business or as another entity, and entirely unconnected with a recipient as defined by the bill, receives federal financial assistance to conduct activities, those activities presumably are not covered by the bill. Because so much federal aid is provided to entities falling within the bill's definition of "recipient," this omission may not have very much practical significance. Congressional intent with respect to such "persons" receiving federal aid, however, should be clear.

"Recipients" and "Subunits"

While the bill's definition of recipient is modeled on definitions in existing regulations, it contains a potentially significant, additional clause not found in those definitions. S. 2568's definition of recipient includes entities "which receive[] support from the extension of federal financial assistance to any of its subunits." What "receives support" means is not altogether clear. It could be interpreted as referring only to funds. However, Senator Cranston, commenting on the bill, said that "the concept of 'support' is intended to refer to a not immaterial support having monetary value which could include, for example, services" (S4595, April 12, 1984). For example, if a municipality's fire department receives federal funds to build a fire station, clearly the fire department is covered. Does the municipal government "receive support" from the fire department? If the fire department performs routine checks on fire safety equipment in municipal buildings and puts out fires in municipal buildings, are those services to the municipal government sufficient to subject all of the municipal government's activities to the civil rights statutes? If the municipality was able to spend on other activities the funds it would have spent on the fire department, would that support trigger coverage of the municipality's other activities? The answers to these questions may not be terribly significant where the municipality or other recipient is receiving a wide variety of federal aid which would lead to wide coverage of the municipality in any event. But not all municipalities and other recipients necessarily receive such extensive federal aid and the answers to these questions may be important to them.

Federally-Assisted Educational Programs at Non-Education Recipients -- How Much Coverage Under Title IX?

S. 2568 would amend Title IX by forbidding sex discrimination by any "education recipient" of federal aid. The precise scope of this phrase is not clear. The bill would clearly subject all of a college's educational activities to Title IX upon receipt of federal education aid, and the Commission supports such coverage. Suppose, however, that a state prison is conducting a federally-funded vocational education program. Even after Grove City, such a program would be covered under Title IX as it is written today. While we understand that the sponsors of S. 2568 wish to preserve Title IX coverage of a prison's federally-funded educational activities, a goal the Commission supports, the language of the bill does not necessarily achieve that result. A prison may not be readily identified as an "education recipient." Conversely, does the receipt of any federal education money at the prison subject all of the prison's activities to Title IX? Other questions arise: does the receipt of non-educational federal aid to a prison subject the prison's educational activities -- and other activities -- to Title IX? Accordingly, we would urge that any legislation amending Title IX carefully reflect Congress's intent in these areas.

Our purpose in raising these and other examples is to draw your attention to possible interpretations of the bill. Congressional intention about such coverage questions ought to be clear in the legislation so that agencies and courts enforcing the amended statutes, as well as recipients and beneficiaries, understand the obligations of these laws.

Whether Other Statutes Should be Amended

S. 2568 does not seek to amend any of the many categorical and block grant federal financial assistance statutes prohibiting discrimination on the basis of race, color, national origin, sex, religion or creed or handicap. (I wish to discuss the revenue sharing statute separately.) Unlike the four major cross-cutting civil rights statutes, these statutes not only contain nondiscrimination provisions, often with the "program or activity" limitation, they distribute federal aid. It is likely that courts will treat the "program-specific" language in these statutes as narrowly as the Supreme Court did in Grove City. Moreover, there is a doctrine of statutory construction that suggests that a more specific enactment controls the interpretation of coverage even when a more general enactment has also been adopted. There are other doctrines of statutory construction that might lead to the opposite result. Accordingly, unless Congress clarifies the relationship between the four civil rights statutes and the civil rights provisions of these funding statutes, there is a risk that courts and others might defer to the narrower provisions in the funding statutes themselves. If Congress makes clear that the scope of the four cross-cutting statutes, as amended, supersedes the civil rights scope of the individual funding statutes that contain "program or activity" language -- putting aside the revenue sharing act -- any potential inconsistency between them will probably be substantially reduced.

Even if such clarity is achieved, however, S. 2568 will not restore protections against sex discrimination and religious discrimination contained in some funding statutes to the broad scope thought to exist prior to Grove City. Title IX only covers education recipients; even at recipients such as prisons, it presumably only covers educational activities. But, a funding statute with a "program-specific" ban on sex discrimination that provides federal aid to a recipient that conducts no educational activities will likely remain subject to the narrowed interpretation of Grove City even if S. 2568 is adopted. For example, the federal Water Pollution Control Act of 1948, as amended in 1972, prohibits sex discrimination in programs funded under its authority. This prohibition against sex discrimination under the pre-Grove City broad approach would have covered the entire recipient. The Supreme Court's narrower interpretation of "program or activity" seriously jeopardizes such recipient-wide coverage under that Act. Amending Title IX won't rescue this and other statutes providing federal aid to non-education recipients when those statutes have program-specific limitations in their anti-sex discrimination clause.

Moreover, S. 2568 does nothing to restore recipient-wide coverage of those provisions in funding statutes which prohibit religious discrimination. For example, the Full Employment and Balanced Growth Act of 1978 forbids religious discrimination in programs funded under the Act.

S. 2568 and the Revenue Sharing Program

I also wish to draw your attention to the potential impact of S. 2568 on the revenue sharing program. That program provides virtually unrestricted federal money to local governments for use as they see fit. The nondiscrimination provision in the revenue sharing statute contains a program-specific ban against discrimination on the basis of race, color, national origin and sex. It also incorporates by reference the Age Discrimination Act and Section 504. Moreover, the provision also contains the following language: the prohibitions against discrimination in this statute "do not apply when the [local] government shows, by clear and convincing evidence, that a payment received under this chapter is not used to pay for any part of the program or activity." This amounts to a "rebuttable presumption"; in other words, it is presumed that the entire locality is covered under the revenue sharing program unless it can demonstrate that revenue sharing funds were not used in particular activities. Accordingly, prior to Grove City, if a locality spent its revenue sharing funds only to build a park and could show that the payment was not used for anything other than a park, only its parks and recreation department would be covered by the civil rights laws.

Under S. 2568, would this "rebuttable presumption" be available to a locality? As a practical matter, eliminating the rebuttable presumption under the revenue sharing act may not have a substantially broadening effect on civil rights coverage because local governments undoubtedly receive other forms of federal aid. Nevertheless, if the rebuttable presumption is effectively eliminated it is likely that some -- perhaps many -- local governments would find more of their activities covered by the civil rights provisions than was the case even before Grove City. Indeed, a locality receiving revenue sharing funds without the availability of the rebuttable presumption might find, for example, its licensing activities -- for various occupations and the like -- subject to the federal civil rights statutes where they had not been so subject before Grove City. Here, again, the significance is that the federal regulations enforcing these statutes apply an "effects" test, rather than the "intent" test generally used under the Constitution in determining whether discrimination is occurring.

Scope of Fund Termination Power

I also want to mention briefly some concerns about the fund termination provisions in S. 2568. The bill would change part of the pinpoint termination provisions by limiting the "effect [of the termination] to the particular assistance which supports [the] noncompliance...." Here, again, the meaning of "supports" is crucial. Unless clarified, this language could be interpreted to either broaden or reduce the scope of an agency's fund termination power. Neither result is favored by the Commission.

Once the principle is established that federal aid to one part of the recipient subjects the entire recipient to coverage, the statutes' fund termination clauses, as amended by the bill, could be read to mean that all aid at a recipient "supports" any noncompliance at the recipient. This is particularly true if one views the receipt of federal aid as "freeing up" -- or "releasing" -- the recipient's own funds to be used elsewhere by the recipient. If the enforcers of the statute take this approach, the termination power could be broadened. On the other hand, if "supports" is defined narrowly, an agency might be required to terminate some, but not all, of the federal aid to the part of the institution which was found to be in noncompliance. Let me give an example to show both possibilities. Suppose a school district receives federal aid for its elementary and secondary school programs. Suppose, further, that it receives federal funds for a separate evening program of adult education. If the agency finds that there is a Title VI violation in the adult program because it attempts to recruit only white participants, is all federal aid to the school district to be cut off? Instead, could only federal funds to the adult education program be terminated? Or, could the agency cut off only that portion of the federal aid used to "support" the discriminatory recruiting effort? The first option, we believe, is probably broader than pre-Grove City enforcement policies, and the third option is probably narrower than those earlier enforcement policies. Clarity as to the extent of the termination power is important in the overall enforcement scheme.

To reiterate, we believe that the scope of such terms as "education recipient," "recipient", entity "which receives support from the extension of federal financial assistance to any of its subunits," and the termination power must be clarified.

Thank you.

TESTIMONY OF CLARENCE M. PENDLETON, JR.
CHAIRMAN OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS
BEFORE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

May 30, 1984

Chairman Hatch, I am delighted to appear before you on behalf of the United States Commission on Civil Rights.

We believe that legislation overturning the narrowing effects of the Grove City opinion on Title IX and other civil rights statutes should be passed by this Congress. The previous Commission closely followed the Grove City case and expressed support for broad coverage of Title IX, as well as Title VI, Section 504, and the Age Discrimination Act. I am here to reiterate that view on behalf of the current Commission. The Commissioners adopted a general statement on March 28, 1984, concerning this matter which I would like to submit for the record. I would like to focus on some of the points made in the statement.

Commission's Position on Scope of These Statutes

First, with respect to the regulatory authority of funding agencies and the scope of private lawsuits, the Commission firmly supports broad, recipient-wide coverage under Title IX, Title VI, Section 504, and the Age Discrimination Act. Such coverage is important because federal tax dollars should not support discrimination. While the Supreme Court dealt only with Title IX in Grove City, the phrase it interpreted, "program or activity," is a limitation common to Title VI, Section 504, and the Age Discrimination Act. Thus, it is appropriate to provide clarifying language in those three statutes, as well as Title IX.

While I will not dwell on this point, the importance of adopting legislation overturning Grove City cannot be overstated. Participants in federally assisted institutions should not be left outside the protection of these landmark statutes.

Whether Other Statutes Should Be Amended

The Commission believes that Congress should consider the desirability of providing institution-wide coverage of recipients under a variety of other federal funding statutes that use "program or activity" language. It is important to understand that the Supreme Court's interpretation of "program or activity" is likely to be applied to the "program or activity" language in these other statutes as well.

Commission Position on Agency Remedial Power

Second, the Commission believes that the scope of an agency's remedial power should be retained as currently set forth in Section 602 of Title VI and Section 902 of Title IX. Presently, if voluntary compliance efforts fail, a federal funding agency has two principal tools for obtaining compliance with these four statutes. Under one approach, an agency may terminate its federal financial assistance to a noncomplying recipient. The law currently states that such a fund termination must "be limited to the particular entity, or part thereof, or other recipient as to whom [a finding of noncompliance] has been made and, shall be limited in its effect to the particular program, or part thereof, in which noncompliance has been so found." This is the so-called "pinpoint" termination provision and the Commission supports its retention. Fund termination is a drastic remedy, which denies federal aid to participants at a federally funded recipient as well as to the offending recipient itself. Fund termination should continue to be carefully limited.

The other remedial tool by which an agency enforces these civil rights statutes is, in the language of section 602 and 902, through "other means authorized by law." Such means now include the agency's referral of a matter to the Department of Justice for judicial action. Federal funding agencies are able to use such "other means," including Department of Justice litigation, throughout the entire recipient. Under the broad pre-Grove City approach, if a recipient received federal aid only for one of its activities, the funding agency could have sought to eliminate prohibited discrimination in other parts of that recipient by referring the matter to the Department of Justice. The agency, however, could only seek to terminate its federal aid to the recipient if the discrimination occurred in the particular activity funded by the Federal government. The Commission supports this pre-Grove City enforcement scheme.

General Comments on S. 2568

In conclusion, let me urge you, on behalf of the Commission, to restore the scope of these civil rights laws to their broad, pre-Grove City scope. At the same time, care should be taken to clarify how any bill, including S. 2568, should be enforced.

In turning to S. 2568, I must make clear that the Commission has not reviewed the specific language in this bill. Consequently, the Commission has not determined whether it achieves the objectives outlined in our March 28, 1984, statement. Our staff has looked at the bill and has some preliminary thoughts and questions concerning it. I want to ask the Commission's Staff Director, Linda Chavez, to share with you some of the general points staff believes the Committee should consider in reviewing S. 2568.

The **Chairman**. Thank you.
Professor Fried.

STATEMENT OF CHARLES FRIED, PROFESSOR OF LAW, HARVARD UNIVERSITY

Mr. **Fried**. Thank you for asking me to testify again.

The **Chairman**. Would you pull your mike over just a little bit, Professor Fried, so we can all hear you?

Mr. **Fried**. Yes. I think this bill is most unfortunate. It is most unfortunate because it would cause burdensome, but unpredictable, changes throughout the legal system. It would make broad and sweeping changes which have not really been carefully examined or thought through, leaving it to others, courts and agencies, to clean up the mess.

The claim is that this bill does nothing more than simply restore the legal situation to what it was before *Grove City College*. I believe that claim is extravagantly wrong. But it's easy enough to see why to the many sponsors of the bill it might have seemed reasonably plausible.

First of all, the bill is drafted in a most confusing and invisible way. And if you actually read the text of the bill itself, there is no way at all to gather what it accomplishes.

Moreover, the bill uses language from the regulations, and therefore it seems like it's not doing anything new. But of course, the regulations were enacted under the context of quite different statutory language.

Let's look for a moment at the *Grove City* case itself. The *Grove City College* case, we shouldn't forget, carried both good news and bad news. The good news was that Pell grants were financial aid to colleges receiving them. The bad news was that trying to square that decision with the very explicit program-specific language in section 902, which had been insisted on by Senator Bayh, the Court found no way to give that language effect other than by saying, "Well, it's only the financial aid program which falls under the aegis of section 902."

Now, where's the beef? The beef is that this really is too narrow, that if a college is federally aided, surely all of its student-related activities should be covered. And I agree with that. And the notion of simply covering the financial aid program just seemed a little bit narrow and ungenerous.

And may I say, a particular concern to women's groups have been athletic programs in universities, where there has been a lot of progress made by women, but it's progress made against a background of considerable conservatism and reluctance. And of course, athletic programs typically receive no Federal aid. So that was a particular area of concern, and a justified one.

Now, that's the evil of "*Grove City College*." Look at what Senate 2568 does, and tell me that that really is only returning the law to its pre-*Grove City College* situation. First of all, it would mean that all programs of an educational recipient, including noneducational programs—for instance, its rental housing, its investments, its broadcasting, its publishing activities—would be covered. That's not returning the law to pre-*Grove City*.

Senator **Metzenbaum**. Professor Fried.

Mr. **Fried**. Yes, sir.

Senator **Metzenbaum**. I have heard both you and Ms. Chavez mention the matter of housing, and you mention investments and others.

Mr. **Fried**. Yes, sir.

Senator **Metzenbaum**. Are you here saying, are both of you here saying, that there should be permitted discrimination or practices, discriminatory practices, with respect to housing if it's owned by the university?

Mr. **Fried**. Certainly not, sir. However, that discrimination is already covered under the Federal laws banning housing discrimination. What this would do would be to put under an effects-test type of regulation all sorts of activities which are not presently covered. I think the point is, sir, not that discrimination is something we should tolerate—because we should not—but that we should not pretend that this statute is simply returning the law to what it was before *Grove City*, because surely nobody prior to *Grove City College* thought that section 902 of that act referred to rental housing owned by a university.

Similarly, the act would cover educational programs of noneducational recipients, so that if a museum gets money or a prison gets money not as an educational recipient, then any educational program it has would be covered. Now, again this may be a good idea or a bad idea, but it's not the old idea. And I think that's the point.

The **Chairman**. Could we wait and hold questions until he finishes? We are only giving these witnesses 5 minutes. We gave you a little bit more time, Ms. Chavez, and we messed up this machine, so we're probably going to wind up giving you a minute or so more.

But let's hold our questions until they testify, and then we will make sure we have enough time.

Senator **Metzenbaum**. Yes.

Mr. **Fried**. Just as you wish. When you move to title VI, there is the whole problem which Ms. Chavez referred to of "trickle up, trickle down, and trickle over," so that if you give a nickel of Federal aid to any department of a State government, then the whole State government may fall under the aegis of the act, including all sorts of other specific programs which are not the recipients of aid. Once again, this may be a good idea or a bad idea, but it is not, I think, really—it's somewhat disingenuous to say that that is the old idea prior to *Grove City College*.

And then finally, when you get to section 504, the effect is to include transferees now of private institutions. I think, for instance, of lenders, borrowers from banks which are the recipients of Federal aid would become required to, for instance, install wheelchair ramps in any of the buildings which they build simply by virtue of borrowing money from a bank which receives money from the Federal Government.

That may be a good idea or a bad idea, but I don't think it can fairly be stated that that is the old idea prior to section 504—prior to *Grove City College*.

Well, so what? We are talking about antidiscrimination aren't we? And isn't it good to take any pretext—and, sir, I wish to say I think that *Grove City College* is a pretext—isn't it good to take any pretext to push Federal prohibitions of discrimination—gender, race, age, handicap—to the absolute limit of Federal power?

Well, I would agree with that if we were talking about intentional discrimination. As I said before, if we were talking about intentional discrimination, I wouldn't care if the Senate made it illegal for me to discriminate in who I take home to dinner. But we're not talking about intentional discrimination, and every one of these statutes has not an intents test, but an effects test. And there we are in an entirely different ballgame. The ballgame there, sir, is a ballgame where institutions which are not trying to do something wicked, which is to discriminate, but are trying to pursue a number of goals, are told that the effect of pursuing one goal rather than the other is to disadvantage certain groups—the handicapped, the aged, women, or racial minorities.

And when you do that, what you're telling institutions is not that they mustn't pursue wicked goals—because I am all for saying they must not do that—but you're telling them how they should order their priorities between admittedly good goals. And when that is what you're doing, then it seems to me you should go carefully, you should look carefully whether in each specific instance a need has been shown to interfere and to broaden the base for that kind of intervention.

If I may have 30 seconds more, sir.

It might be said—it might be said that some of the extreme examples that have been put are nonsense, that no sensible Government bureaucrat would extend the law to those cases. And I agree with that. However, you must realize that all of these statutes are susceptible to private courses of action, and private attorneys have no incentives at all to limit this language; they have every incentive to push it to the limit of its logic, leaving it to judges to fix it up. And may I say, judges have rather unevenly distributed resources of common sense. [Laughter.]

And I am not sure that we can be sure that all Federal district judges will show the same degree of common sense in limiting what is now absolutely wide-open language under this bill.

Thank you very much, sir.

[The prepared statement of Mr. Fried follows:]

Testimony of Charles Fried on S.2568 Before the Subcommittee on the Constitution

Thank you very much for asking me to appear before you this morning. My name is Charles Fried. I have taught law at the Harvard Law School for the last 24 years. My interest in Senate 2568 is as a citizen and as a student of the legal system.

0.1 A General View of S.2568

This Bill represents our legislative process at its worst. It would make major changes in the structure of our antidiscrimination laws, in the balance of responsiblity between the federal government and the states, in the balance between the responsibilities and prerogatives of private institutions and bureaucratic authority over those institutions. It will greatly enlarge the scope of agency discretión, and do so in an unsystematic, haphazard and overlapping way. It will invite a monumental increase in litigation in the federal courts, while providing little basis for federal judges to discipline and restrain that litigation. And it does all this without any showing of need; it does all this on the wholly spurious ground that we have here nothing more than a technical amendment to a number of statutes, a technical amendment necessitated to remedy the effect of an unfortunate, technical Supreme Court decision.

Indeed the very way in which the Bill is drafted makes it impossible to discover on the face of it the major and sweeping changes that it accomplishes. It is hard for me to believe that all of the distinguished Senators whose names appear at the head of this Bill have worked through and grasped what it will accomplish.

0.2 The "Evil" to be Remedied: *Grove City College v. Bell*

The occasion for Senate 2568 is the decision of the Supreme Court in *Grove City College v. Bell*, which was handed down on February 28, 1984. A number of commentators, a number of senators and congressmen have claimed that the Supreme Court misunderstood the intent of the Senate in that case, and so they have produced this Bill to remedy that error. As a response to the *Grove City Case* this Bill is like using a nuclear bomb, devestating a complex and carefully patterned institutional landscape, to kill a gnat--and it is not even clear that the gnat exists.

Title IX of the Education Amendments of 1972 provides that when a state or private institution--in the *Grove City Case* the institution was a private institution--receives money for an educational program from the federal government, that money may be cut off if the institution discriminates on the basis of gender. In the *Grove City Case* the Supreme Court held that the statute placed under federal scrutiny only the particular program which received the federal aid, and not the whole institution in which the program was situated. So in *Grove City* when the only federal monies flowing to the College were through scholarships paid directly to students, only the financial aid office might be placed under federal scrutiny, not the whole College. It is this decision which was thought to be wrong, which was claimed to misconceive the original congressional intent.

0.3 The Reach of S.2568

Section 2 of the Bill would have the effect of placing under federal scrutiny for gender discrimination any educational program of any public or private institution which receives a dollar of federal aid, even if that federal aid is paid to portions of the institution which have nothing to do with education. Moreover it places under federal gender discrimination jurisdiction *all* programs of an educational institution, whether these programs have anything to do with education or not, if the educational institution receives a dollar of federal aid to any aspect of its program.

Having worked these changes in Section 2, Senate 2568 then also amends the Rehabilitation Act of 1973, which concerns itself with discrimination against the handicapped, so that there too there is a predicate for federal intervention--both bureaucratic and judicial--against any part or aspect of a public or private entity which receives a dollar of federal aid in the same or any other corner or portion of that institution. And then Section 4 goes on to amend the Age Discrimination Act of 1975 in the same way. And in Section 5 the Bill amends Title VI of the Civil Rights Act, which concerns itself with discrimination on the basis of race, color, or national origin, and would lay a predicate for federal bureaucratic and judicial intervention in any and every program of a public or private institution which receives a dollar of federal aid in the same or any other corner of the work of that public or private institution.

In other words, Senate 2568 having found fault with the Supreme Court's interpretation of the program specificity language in Title IX has proceeded mechanically to extirpate that language wherever it appears in anti-discrimination provisions throughout the United States Code. This is not thoughtful legislation. This is not measuring the remedy by the evil. It looks rather more like legislation by work processor--search and globally replace.

Before I sketch out for you the devastation this technical-seeming Bill would work in the careful institutional balance of our antidiscrimination laws, before I describe for you the havoc which would be raised by this legislative nuclear bomb, let's see if the gnat it is aimed at even exists.

0.4 Does an "Evil" Exist to be Remedied?

As a result of the Supreme Court's Grove City College decision, that small private institution is dispensed from executing an assurance to the Department of Education that it does not discriminate on the basis of gender in all of its programs, but it must still give that assurance in respect to its financial aid program. Is this such a disaster? Well, as you know, Grove City College has never been accused by anybody of discriminating against anyone. Its record in this regard is exemplary. It has fought this case because it would like to be left alone to do its very good work--as everyone agrees--among men and women of all races without having to answer to the federal bureaucracy, without having to file endless forms about every part of its operations. After the Supreme Court's decision, they will not be able to do that entirely-- receipt by some of their students of Pell Grants puts them under the Department of Education's Title IX thumb at least in respect to their financial aid program, but no more.

Surely there is no great tragedy or travesty here. No evil requiring such a massive legislative response.

Perhaps, then, the gnat exists elsewhere--not at Grove City College. Perhaps this wider tool of federal intrusion is necessary to remedy a wider evil, and the innocent Grove City Colleges must pay what is, after all, not such a great price.

There is no showing that women are being deprived of educational opportunity, educational equality, or would be so deprived by the _Grove City College_ decision. Is it the principle of the thing, then? Or the potential for mischief? But what principle, what mischief? Even if the _Grove City College_ decision were allowed to stand, the Congress would hardly be seen as approving gender discrimination. Most private institutions receiving federal funds are not so particular as Grove City College, not so eager to do things on their own, with the result that even under the most restrictive reading of the Supreme Court's decision there is little if any room for gender discrimination in most such institutions. Where the educational opportunities are afforded by state or local governments the Constitution itself guarantees equality of opportunity under the Equal Protection Clause. Under the Supreme Court's own decision this Term in the _Bob Jones University Case_ institutions enjoying the benefit of federal charitable deductions are further constrained to respect the principle of equality. Finally, Title VII of the Civil Rights Act is a sweeping mandate against all discrimination in employment --public or private

So I ask again where is the evil at which this legislation is directed? Where is the showing of any necessity for stamping out the results of the _Grove City College_ decision, and with it trampling on Grove City College's desire to preserve some measure of autonomy from federal bureaucratic intrusion? Indeed, one might view this legislation as being born not out of some careful study of needs, but out of a reflex of congressional pique.

There is one sensible basis for legislation: that _Grove City_ was too restrictive and ungenerous a reading of the particular statutory language in Title IX. It is z an arguable and not far-fetched position that Congress originally contemplated implicating more than an institution's financial aid program if that institution's students received federal scholarship money. The students' tuition _does_ flow through the whole college or university, the students sit in classes with other students, and so the argument might be made that after all the whole program to which these students are exposed should fall under Title IX and not just the scholarship program. The legislative history of Section 901(a) of Title IX makes it abundantly clear that its proponents --proponents like Senator Bayh,[,1] who were much concerned with discrimination against women -- viewed program-specificity as an integral aspect of that provision. The suggestion that the Supreme Court somehow twisted Congressional purpose by also insisting on program-specificity seems to me one which a fair reading of the materials just will not bear. Nor was the Grove City case a departure in the Court's own dealing with the statute, since it had already reached a similar conclusion in North Haven B'd of Educ. v. Bell. What may, therefore, be plausibly argued is that the Supreme Court took too narrow a view of what program-specificity entailed in a case such as Grove City, and that program-specificity itself might mean coverage for all of a college's educational programs, when its students receive federally funded scholarships.

0.5 S.2568 Upsets the Present Carefully Crafted Institutional Balance of Responsibilities

0.5.1 The Changes in Tile IX Go Far Beyond Even The Supposed Occasion

Even if the Grove City College decision needs to be reversed, Section 2 goes far beyond reversing that decision. It is a reasonable reading of this rather unreasonable piece of legislation that every activity of an educational recipient--whether that activity is educational or not--would be subject to Title IX. So if a private educational institution owns and manages real estate, runs a radio station, publishes books, all of these would be swept into the net of the now revised Title IX.

Now sweeping them in would do more than simply expand opportunities for women. For unlike the Constitution, unlike the ordinary notion of equal opportunity, Title IX includes an effects test, so that even where there is no purpose to discriminate, perfectly innocent, perfectly sensible practices which have the underlying effect of yielding fewer benefits proportionately to women than to men are subject to the strictures of Title IX. And this in spite of the fact that Title VII and Section 1982 of 42 U.S.C and Executive Order 11063 already subject such institutions, in so far as they are employers or providers of housing, to

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1. Senator Bayh stated that the "effect of termination of funds is limited to the particular entity and program (emphasis added) in which such noncompliance is found." Quoted in North Haven B'd of Educ. v. Bell, 456 U.S. 512, at 537.

stringent federal regulation.

But Section 2 of Senate 2568 goes further still. Take the case of a public or private institution which is not primarily an educational institution--not a school or university, but say a state or county government, or a hospital or prison. If any program anywhere in that public or private institution, in that governmental unit, receives a dollar of federal aid for any purpose, then educational programs of that governmental unit or institution fall within the scope of Title IX, fall under the jurisdiction of the Department of Education, with its reporting requirements, regulations and effects test, even though those educational programs are not themselves the recipients of federal aid.

0.5.2 Sweeping Effect of the Changes in Title VI

The revision of the language of Title VI proposed by Senate 2568 is in some respects even more unsettling of established institutional lines of responsibility. Title VI prohibits discrimination in state and local programs which receive federal monies, discrimination on the basis of race, color or national origin. The effect of Section 5 of Sentate 2568 would be to subject every single activity of state or local governments to the supervision of every federal agency which disburses any money to any part of such a state or local governmental entity. Once again it should be remembered that Title VII already enforces equality of employement opportunities under an effects test on virtually all employers, and the Equal Protection clause of the Constitution forbids intentional discrimination by state and local governments in any aspect whatever of any of their programs. By sweeping aside the programs specificity language of the present Title VI, the congress would be subjecting every single state and local government activity to multiple reporting requirements and expanded antidiscrimination scrutiny under an effects test.

As I have stated, there is a fair argument that the Grove City Case--which is the purported occasion for this legislation--gave too narrow a reading to the program specificity language in Title IX, as it applies to federally funded scholarships. But this legislation goes on to make major changes in the scope and coverage of Title VI, which focusses on the quite different area of federal aid to state and local governments. And it does so without any showing that a need exists, that a problem (such as that raised by Grove City) exists, or that institutionally and bureaucratically this is a sensible way to solve what problems there may be.

Under this casually sweeping piece of legislation it would become an open question whether a city which sold taxi medalions or cable television franchises to the highest bidder was in violation of the law, because the effect of such a scheme--where quite plainly there is no intention to discriminate--is to bear differentially on different racial groups.

0.5.3 Sweeping Effect of the Changes in the Rehabilitation Act

And Section 3 of Senate 2568 has a similarly far-reaching but unexamined effect in respect to disadvantages imposed upon the handicapped. There is little doubt that the situation of the handicapped deserves fuller, more comprehensive federal attention. But the word processor/global-search-and-replace strategy of this piece of legislation hardly represents the intelligent attention which this serious problem deserves. As a result of this legislation it is fairly arguable that any public or private recipient of federal aid to any of its programs, to any corner of its operation, is thereby wholly responsible in all of its operations to assure that the *effects* [,2] of its choices do not burden the handicapped, even though there may be no purpose at all to discriminate against the handicapped.

0.5.4 Possible Inclusion of Vendors and Other Remote Beneficiaries

So sweeping and undiscriminating is the language of Senate 2568 that a more than plausible interpretation would have it that not only the totality of recipient institutions -- public and private -- are swept into the bureaucratic jurisdiction of Title VI, Title IX and Section 504 with their effects tests, but that even persons doing business with such public or private institutions might to some unspecified extent be subject to these provisions now for the first time. A grocery store taking food stamps in payment for groceries might be subject to Section 504. A bookstore catering to college students might be subject to Titles VI and IX and Section 504--although of course it is already subject to Title VII in respect to its employement practices.

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2. On the applicability of the effects test to Section 504 of the Rehabilitation Act, see Jennings v. Alexander, 715 F.2d 1036 (6th Cir. 1983)

0.6 The Bill's "Pin-point" Limitation on Funds Cut-Offs is Insufficient to Contain the Bill's Excessive Reach

The Bill limits funds cut-off authority to those funds which are found to "support" the non-compliance. But this limitation does not protect against the apprehended evil of possibly open-ended subjection to federal effects test scrutiny for sex, age, handicap and race discrimination. First and most importantly, each of these provisions would give rise to a private action in federal court, and such private action would not be subject to the "support" limitation. Similarly the Department of Justice would be empowered to seek injunctive relief without regard to such a limitation. And finally, it is far from clear that the Bill would not authorize agencies to issue regulations which travel outside the "supported discrimination" category --e.g. regulations requiring extensive reports in respect to non-related, unfunded activities by federal aid recipients. Failure to comply with such far-ranging regulations might then constitute sufficient non-compliance to justify funds cut-offs after all.

0.7 Multiple Overlapping and Proliferating Reporting and Other Compliance Burdens

In their excessive and undiscriminating zeal to spread the federal anti-discriminatory net as widely as possible the drafters of S. 2568 have created a situation where recipients of federal funds from any federal agency in any corner of their operations will be subject to reporting requirements and compliance reviews by each such funding agency in respect to all --even totally unrelated -- activities. A university would have to report to D.O. Ed. regarding its investment real estate holdings and its publishing operations. A state receiving highway moneys would subject all of its agencies and all of its subunits to reporting requirements to D.O.T. regarding its health policies. A private business doing work as a defense contractor would have to report on all of its practices to D.O.D.

It is hard to believe that the sponsors of S.2568 intended to impose such pointless paperwork burdens on state and local governments which they represent. Yet there is no way to avoid these burdens under the Bill as drafted, for it is the very strategy of that Bill to extend federal authority to its utmost corner, once the predicate of federal funding has been laid. It is that strategy which is mistaken and should be reconsidered.

0.8 Legislative Responsibility and the Parade of Horribles

Now it might be said that this parade of horribles is unrealistic. That these are stories to frighten children with. These things will not come to pass. The bureaucracy must write regulations and in so doing it will exercise restraint, won't it? An agency must make choices, and it will use common sense, won't it? Will it? Such a vainly reassuring response to what I consider wholly justified objections would be a symptom of one of the serious diseases afflicting the legislative process and the legislation which it produces.

0.8.1 Passing the Buck to Bureaucrats and Judges

The reflex to write legislation as broad as the earth and as high as the sky hoping that some agency, some bureaucrat will exercise the restraint and commonsense which Congress had not the time or the wit to devise is the besetting affliction of the United States Code. It represents a dereliction of duty on the part of legislators, who are supposed to think through what they are doing instead of broadly and vaguely pointing in the direction of the problem, hoping that somebody else will do the thinking for them.

Observers of every political stripe have inveighed at some time or another against the flood of regulations, the tidal wave of litigation, and the attendant usurpations by both bureaucrats and federal judges of a power which should be the people's, that is the Congress's. And yet a Congress that would contemplate passing such a sweeping, ill-thought out, unprepared piece of legislation as S. 2568 is exactly responsible for the uncertainties which it then leaves to others--bureaucrats and judges--to sort out.

But this complaint apart, there is no basis for the confidence that bureaucrats and judges will exercise restraint and common sense where Congress has failed to do so. You and I know perfectly well that legislation like this is on a ratchet; it goes in one direction only--so that it will be with us for generations to come. Over those generations there is no reason for confidence that there will not be scores of federal judges exercising less than common sense, scores of bureaucrats exercising the opposite of restraint.

0.8.2 Pressure on Agencies to Push Authority to its Limits

Even if agency heads were inclined to be restrained, the law may not allow them to be. The possibility of law suits, the threat even of federal officials' personal liability as under the recent decisions in Harlow & Butterfield v. Fitzgerald, 102 S. Ct. 2727 (1982) and National Black Police Ass'n v. Velde, 712 F. 2d 569 (D.C. Cir. 1983), cert. denied (1984) will quickly dampen any inclination towards restraint which might exist within the bureaucracy.

0.8.3 Unleashing Private Law Suits

Finally, even if restraint were imposed by the bureaucracy every one of these antidiscrimination statutes--Title IX, Title VI, the Rehabilitation Act, the Age Discrimination Act--allows for private causes of action against the recipients of federal monies. If nothing else should give this Committee pause, then the prospect of the immense increase in the scope for such private causes of action--with very tempting fee awards to successful attorneys--should cause the Senate to think twice about this Bill. These private causes of action allow private parties to sue state and local governments, private recipients, perhaps even those doing business with recipients of federal aid to enforce the now expanded definitions of discrimination.

0.8.3.1 Possibly Crushing Money Damages

Heretofore, and by narrow margins, the Supreme Court has in a number of these statutes applied what might be called the Pennhurst Doctrine by which a private party bringing an action under any of these statutes can obtain only prospective relief, not "make whole"--i.e. money -- damages. (Of course, the private party's lawyer may be able to obtain legal fees by award of the court even if his client obtains only prospective relief, no money damages.) Yet the sweep of Senate 2568 is such that the rather fragile reasoning in the Pennhurst Case, recently narrowly reaffirmed in the Guardins Case, might no longer hold. The minority view, urged by Justice Marshall, that Congress intended to use the federal aid as a jurisdictional predicate for proclaiming a right, is a view which would have considerably more force if S. 2568 were to become law. And with that greater force, Justice Marshall's view that in all of these instances state and local governments, private businesses and charitable institutions, should be liable for money damages might very well prevail.

I ask you to pause and think carefully just what it is you are doing in this Bill and why. Thank you very much.

Fried -rev 5.27 /s.2568

APPENDIX -- EXAMPLES

1. Unrelated Non-Educational Activities of Educational Recipients under Revised Title IX

In the wake of a well-publicized series of assaults against women, a public interest law firm might bring a class action against a university owning apartment buildings for investment purposes claiming that failure to provide guards and other security precautions in these buildings has the effect of discriminating against women.

In any event all such unrelated activities might be required to file compliance forms and statistics with D. O. Ed., even though they probably do so already under with different agencies such as H.U.D., OFCCP, EEOC under other provisions of law.

2. Non-Recipient Educational Activities of Recipients of Non-Educational Federal Funds

A hospital receiving federal moneys for medical research would be subject to a private suit alleging that an unrelated educational activity --say, a program to train midwives -- has the effect of discriminating on the basis of gender.

A police department which received federal moneys used to upgrade communications equipment would be subject to a private suit alleging that a program designed to educate merchants regarding ways to deter shoplifting or to educate welfare agencies regarding detection of certain categories of welfare fraud has the effect of discriminating against women, if those subject to apprehension are disproportionately women.

Testing services such a Educational Testing which receive any federal money directly or as contractors of institutions that receive such money would be subject to effects test private suits if scores on their tests do not have the same distribution for men as for women.

State certification procedures such as teacher certification, bar exams or drivers education would be subject to effect test private suits by disappointed applicants on the ground that testing is an educational activity.

3. Extension of Title VI to Unrelated Activities

Any state, county or town receiving federal assistance anywhere in its programs would be subject to private suit under an effects test if its bar exams, real estate licensure exams, franchise allocation procedures --e.g. for bus or Cable TV franchises --or contracting procedures, though facially neutral and without discriminatory intent, had a disparate impact on minority applicants.

As in paragraph 2 above, testing services performing testing under contract with state agencies would have to justify under a Title VI effects test any disparate impact which their tests might have for admission to programs or for enjoyment of benefits.

4. Extension of the Rehabilitation Act of 1973 to Unrelated Activities

A TV station owned in part by a university recipient of federal aid might be sued by a public interest group representing deaf person under an effects test for failure to caption all of its programs for the hearing impaired.

A theater or music recipient of an NEA grant would be subject to private suit if it performed in a hall which did not provide satisfactory access to handicapped persons.

Private movie theaters showing a film funded in part by NEA grants might similarly be subject to private suits for failure to provide handicap access.

State and non-profit recipients of federal moneys would be subject to private suits by various categories of physically, emotionally and mentally handicapped persons questioning their decisions to continue, discontinue or modify programs relating to those groups, even if those programs have not been the recipients of federal funds. In Jennings v. Alexander, 715 F.2d 1036 (6th Cir. 1983), the court held that a cause of action under Section 504 was stated against the State of Tennessee by handicapped persons suing to block a change in the state's Medicaid program limiting the total number of reimbursable hospital days, on the ground that such a limuitation bore more harshly on handicapped persons. The Medicaid program, ofcourse, is a federally funded program. Under the proposed Bill a similar suit could be brought against the state in respect to any program decision, federally funded or not, so long as the governmental unit is in receipt of any federal funds.

Fried -rev 5.27 /s.2568

Table of Contents

- 0.1 A General View of S.2568 1
- 0.2 The "Evil" to be Remedied: *Grove City College v. Bell* 2
- 0.3 The Reach of S.2568 2
- 0.4 Does an "Evil" Exist to be Remedied? 3
- 0.5 S.2568 Upsets the Present Carefully Crafted Institutional Balance of Responsibilities 5
  - 0.5.1 The Changes in Tile IX Go Far Beyond Even The Supposed Occasion 5
  - 0.5.2 Sweeping Effect of the Changes in Title VI 6
  - 0.5.3 Sweeping Effect of the Changes in the Rehabilitation Act 7
  - 0.5.4 Possible Inclusion of Vendors and Other Remote Beneficiaries 7
- 0.6 The Bill's "Pin-point" Limitation on Funds Cut-Offs is Insufficient to Contain the Bill's Excessive Reach 8
- 0.7 Multiple Overlapping and Proliferating Reporting and Other Compliance Burdens 8
- 0.8 Legislative Responsibility and the Parade of Horribles 9
  - 0.8.1 Passing the Buck to Bureaucrats and Judges 9
  - 0.8.2 Pressure on Agencies to Push Authority to its Limits 10
  - 0.8.3 Unleashing Private Law Suits 10
    - 0.8.3.1 Possibly Crushing Money Damages 10

The CHAIRMAN. Well, thank you, Professor Fried.

Ms. Chavez, in a publication from the Civil Rights Commission, "Child Care and Equal Opportunity for Women," the Commission raises the issue that equal opportunity for women will not be attainable unless women have ready access to daycare services for their children. In particular, as to title IX, this publication cited the case of *De la Cruz* v. *Torme*, which held that the claims by certain women against a community college for restricting daycare services stated a cause of action under title IX. The ninth circuit stated that there was "little doubt that a discretionary effect has been shown to fall overwhelmingly on women students."

Does the Civil Rights Act of 1984, assuming an effects test, mean that educational institutions must also provide daycare services for all women and their young children?

Ms. CHAVEZ. Well, I think that the issue that Professor Fried raised in terms of the effects test versus the intents test certainly would leave it possible for courts to decide that anything that had a disparate impact on women and might therefore narrow their opportunity, could in fact be a violation. And that is exactly the concern that the Commission raised. And as a matter of fact, the Commission in its policy statement suggested that the Congress ought to take a look at the difference between intent and effects and the fact that the standards, the effects standards as used under title VII.

And this is particularly important when it is used in terms of State governments which heretofore have been held to the intent standard under the Constitution.

The CHAIRMAN. Is it my understanding then that while the Commission has indicated its support for overturning the narrow effects of the *Grove City* decision, that it has taken no particular position on the specific legislation before us?

Ms. CHAVEZ. That's right, except that it did take a position on the pinpointing of fund termination, and it would appear from our reading of this bill that the fund termination provision has been enlarged under the bill before you. And therefore, my assumption is that if the Commission were able to take a look at it, that they would have concerns about that.

The CHAIRMAN. OK. The subject of religious discrimination is within the Commission's scope of authority as well as the subjects of racial and sexual discrimination. Several religious organizations have indicated concern that the religious school exemption in the title IX regulations is so narrow that it is ineffective in protecting the legitimate interests of such institutions.

In other words, if a Catholic-oriented school received $1 in assistance to its physical education program, it would be required to abide by at least four separate provisions of title IX regulations dealing with abortion policy and nondiscrimination against students wishing to secure abortions.

Do you feel legitimate concern here that while we are eliminating the program-specific character of title IX, are we opening up areas of potential difficulty for religiously oriented schools?

Ms. CHAVEZ. Well, it's very clear that there are ambiguities. That is the one thing that is clear about this bill. And if in fact, it would open it up in that way, I would think that we have cause to be concerned about it.

Commissioner Robert Destrow, who was not able to testify today, I think has submitted testimony for your record on the whole question of religious discrimination.

The **Chairman**. What is your overall perspective on S. 2568 from an administrative or enforcement perspective? Do you see any potential for duplication or overlap by various Federal agencies with civil rights responsibility?

Ms. **Chavez**. Well, there would appear to be some potential for overlap, but again the main concern is that we're not quite sure what the bill means, and we're not sure what "recipient" means and we're not sure about some of the other provisions in the bill. And that is our greatest concern.

The **Chairman**. Professor Fried, assume that a university received direct or indirect Federal assistance of one form or another; because of that assistance, would the university be subject to the nondiscriminatory employment standards implicit in title IX?

Mr. **Fried**. It would, sir, but I think it already is because of title VII, so that that would be simply a case of duplication.

The **Chairman**. Thus, a female employee then of the university could sue under title IX alleging employment discrimination based upon sex?

Mr. **Fried**. I think that's possible. But of course, such an employee could bring suit under title VII now, in any event.

The **Chairman**. Could this female employee also sue the university? You are saying she could also sue the university under title VII——

Mr. **Fried**. I believe so, yes.

The **Chairman** [continuing]. Of the Civil Rights Act of 1964?

Mr. **Fried**. Yes.

The **Chairman**. Since the university receives Federal financial assistance, another possibility would be title VI, wouldn't it?

Mr. **Fried**. I think that's correct.

The **Chairman**. But that's only if the primary purpose of the assistance was to provide employment?

Mr. **Fried**. Yes.

The **Chairman**. Is that right? So the university could be sued under title VI if funds were received, as some were, under the Emergency Jobs Appropriations Act, but probably not if they consisted only of VA benefits? Is that correct?

Mr. **Fried**. The title VI employment discrimination provisions do pinpoint to programs which are focused on employment. That is correct.

The **Chairman**. Is it accurate that such contractors would also be covered by both title VII and Executive Order 11-246?

Mr. **Fried**. Oh, I think there's no doubt about that.

The **Chairman**. If S. 2568 were enacted, a decent lawyer representing employees alleging employment discrimination might have to consider whether to file suit under title IX, title VI, title I, or various other Federal and State laws. Isn't that correct?

Mr. **Fried**. I think that a lawyer concerned about earning his congressionally guaranteed fee if he prevails, if he or she prevails in a civil rights action, would have every incentive to sue under each and every one of those sections, yes, sir.

The CHAIRMAN. Assuming that an attorney on behalf of a female university employee sued both under title VII and title IX, who would investigate such a claim of discrimination, the EEOC under title VII, or the Education Department under title IX?

Mr. FRIED. I think it's very hard to answer that. It's possible that an administration handed the nightmare which I believe S. 2568 unamended would be, might take some action to coordinate enforcement responsibilities by some kind of informal or formal lead agency type of arrangement. But as you know, sir, these forms of legislation are in a ratchet; they go in one direction only. It would be with us for 40 years, and in 40 years we will have many administrations, some of them less competent than others. And among the less competent would be those which would not find a way to straighten out the administrative mess that this section would cause.

The CHAIRMAN. My 5 minutes are up.

Senator Metzenbaum.

Senator METZENBAUM. Ms. Chavez, do I understand your position to be that the Commission takes issue with the *Grove City* decision, but that they don't like this legislative solution?

Ms. CHAVEZ. Well, this Commission has not had a chance to review this particular legislation. Most of my comments are based on a staff analysis.

Senator METZENBAUM. Are what?

Ms. CHAVEZ. Most of them are based on a staff analysis. There are certain parts of the Commission's position which make clear that certain provisions of this bill would cause problems for the Commission.

Senator METZENBAUM. But they do generally——

Ms. CHAVEZ. They generally support the whole notion of overturning *Grove City* in terms of broad coverage. The Commission would like to see the laws amended so that we could return to a pre-*Grove City* intepretation of the law.

Senator METZENBAUM. And you, Professor Fried, what is your position on that?

Mr. FRIED. My position, sir, is that I think that it would be a good thing to overturn the specific effects of *Grove City* and to provide quite clearly that if an educational institution receives Federal money, then all of its student-related programs fall under the basis of title IX, with the result that women would have absolutely equal opportunities in all aspects of the educational and social programs of that institution. I think that would be an excellent thing to do.

Senator METZENBAUM. Now, not particularly pertinent to this issue, but I was a little curious. When you responded to the chairman, you indicated, Professor Fried, that when he asked you whether or not a lawyer should proceed under title VI, VII, or IX, and you brought in what I thought was some dictum, that if he wanted to be assured of his congressionally guaranteed fee, that he should do that.

Now, were you making some pointed reference in making that comment?

Mr. **Fried**. I was indeed, sir. [Laughter.]

The reference is to the fact that there has been for a number of years now legislation which guarantees winning attorneys—which allows the award of legal fees to winning attorneys in civil rights cases, and sometimes even attorneys who haven't won but who have raised good and useful issues.

Now, that's not a bad thing to do, but you have to realize that it creates a system of incentives, I believe it was intended to, a system of incentives in terms of which attorneys would be quite imaginative, and the language you have offered today will be passed over and picked over as a possible treasure chest of attorney's fees, by what I would call civil rights bounty hunters, and you can be quite sure that it will be pushed to the limit of its logic. The incentives are there to do so.

Senator **Metzenbaum**. You know, I really have a little difficulty in understanding the world of academia——[Laughter.]

Senator **Metzenbaum** [continuing]. Because the world of academia——

The **Chairman**. He has always had that problem, you know. [Laughter.]

Senator **Metzenbaum**. Yes. You seem to find so much trouble with those lawyers who get paid for taking civil rights cases. I don't very often hear the world of academia coming down on those who find ways to keep their clients from having to pay any taxes, and they get paid far more handsome fees. I don't find any in the world of academia getting excited about the "greenmail" matters, where people milk corporations for literally millions of dollars to the detriment of small shareholders.

I don't hear the world of academia coming down on a host of other situations where really the problem is far more egregious than some lawyer getting paid a fee to see to it that a university or an employer or a hospital or whatever doesn't discriminate against his or her client.

Mr. **Fried**. Well, there are a number of things I would like to say. First, I think that those lawyers ought to get their fee, and I don't really want to be heard to disagree with that. But I think you have to understand the situation that that creates. It creates a situation where those lawyers, unlike bureaucrats running agencies, have no incentive whatever to look at a piece of legislation and say, "Well, what's a sensible moderate interpretation of this?" An agency head is going to do that, because he's politically responsible or she's politically responsible. A lawyer has every incentive to push the words to the limit of their logic.

Now, I am not saying that's bad, but I am saying that's the situation that exists. And I think it would be unrealistic—and you'll forgive me if I seem to lecture from academia—it would be unrealistic to ignore the incentives that are created by that.

Senator **Metzenbaum**. I am worried about the students you graduate, to be sure that they make a living even if they represent civil rights, handle civil rights cases.

The red light is on.

The **Chairman**. Senator Nickles.

Senator NICKLES. Thank you, Mr. Chairman. I didn't have a chance earlier to thank you for having these hearings today; I hope to participate as much as possible.

Ms. Chavez, I apologize for not catching all of your statement. I caught the tail end of it, and also the tail end of Mr. Fried's statement.

Both of you believe that the legislation, as drafted is overly broad. Is that a correct statement?

Ms. CHAVEZ. That it is ambiguous and that it appears to be broader than pre-*Grove City* in its interpretation.

Senator NICKLES. Would you concur with that?

Mr. FRIED. I would be less cautious in my response. I think it is extravagantly overbroad. [Laughter.]

Senator NICKLES. Ms. Chavez, I am looking at the definition, of "recipient". Do you think it could be redefined in a manner that would overturn the *Grove City* decision but not have a great expansion?

Ms. CHAVEZ. We have not been asked to provide language. But we do have a Commission coming up, and I presume that if the Congress were to ask us to provide some language, we would be able to do that.

Senator NICKLES. Some of us are interested in this and I would appreciate any suggestions that you might have. We're in the process of tentatively having a markup on this in the near future, and it would be of interest.

If I might ask the chairman, we don't have any other administration witnesses today, Mr. Reynolds or—do we?

The CHAIRMAN. We don't, no.

Senator NICKLES. I would be interested in receiving your suggestions on how the legislative language of S. 2568 may be changed.

For instance, the definition of "recipient" reads "any successor, assignee, transferee of any such State, subdivision, instrumentality, agency, institution, organization, entity or any such subunit to which Federal financial assistance is extended," to me this language seems awfully broad.

Ms. CHAVEZ. That I think is the phrase or clause which opens up the trickle-down, trickle-up, and trickle-over theories that were discussed earlier.

Senator NICKLES. You mentioned that earlier. Could you please touch on that again? Would that apply, for example, if we found a small community college in the State of Indiana discriminating for whatever reason. Could we not only deny any funds to that institution but to the State as well?

Ms. CHAVEZ. Well, for example, if under a provision a State government was determined to be the recipient, if you applied the effects test, the question is: would the State's licensing activities, for example, under a trickle-up or trickle-over theory be subject to this interpretation and subject to the effects test, so that if you had a test for any of the various practices, if you had a State license for being a veterinarian or whatever, and there was a test applied for that test and that test was shown to have a disparate impact on minorities or women, it would appear that if the State was in fact determined to be a recipient, that those licensing activities would be covered. That would appear to go beyond what we had under the pre-*Grove City* interpretation.

Senator NICKLES. Mr. Fried, could you give us an example of where it might be too broad?

Mr. FRIED. Yes, sir. I think that the example of the bank and their borrowers is a very telling one, and I think many Senators have banks and their constituencies—and the banks would be quite appalled to learn and would, I think, inform the Senators of their consternation if they were aware of the matter, that by virtue of receiving FDIC money or receiving any Federal deposits of any sort, not only they but persons borrowing money from them become subject for the first time, I believe, to this whole panoply of laws, including, for instance, the section 504 of the Rehabilitation Act, which is of course keyed into an effects test.

One way to answer your overbroadness question, Senator Nickles, is this. If you were trying to draft language which was as broad as possible, which would cover every possible instance, which would create trickle-up, trickle-down, and trickle-over, could you think of a better way of doing it than the way which appears in the language which you read?

Now, I think a man is to be taken as intending the natural and probable consequences of his action, and I think that the draftsmen of this bill should be taken as intending the probable consequences of their action, which is to make it as broad as possible.

I don't see how it could be broader. My imagination doesn't reach that far.

Senator NICKLES. There may or may not be a limit to the imaginations of congressmen. This statement may apply as well to Congressmen as your previous statement did to Federal Judges.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Nickles.

Now, I am going to submit additional written questions to each of you, and I would appreciate having your immediate responses back.

I have a number of other questions that are along the same line that do point out the overlapping and difficulties that we have because of the injudicious use of language in this particular bill. And I just want to personally express my appreciation to both of you once again. I really appreciate the counsel that you have given to this committee and the counsel you gave to the Judiciary Committee as well. I respect both of you, and we look forward to having you both testify again before maybe a variety of committees down here.

Mr. FRIED. Thank you.

The CHAIRMAN. Thank you so much.

I would like to ask our second panel to take their places at the table. Dr. Bruce Hafen, representing the presidents of private and independent colleges and universities. Because of his testimony on behalf of these institutions and because Mr. Hafen can also speak for the National Association of Independent Colleges, we have asked him here today.

Joining Mr. Hafen today will be Mr. Richard Epstein, senior vice president of the American Hospital Association. And also joining

Mr. Hafen and Mr. Epstein at the table is Mr. Stuart M. Gerson, who is counsel to the American Hospital Association.

I would like to personally thank each of you for the efforts you have made to get here today. Mr. Hafen and Mr. Epstein have come all the way from the west coast, with Mr. Hafen arriving late last evening, and Mr. Epstein coming on a "red-eye" flight from San Diego early this morning. We all appreciate the efforts you've made to share your concerns with us, and I know that 5 minutes doesn't seem like a long time, but in this place it's a pretty long time.

But we would like to have more time for questions, so I would like each of you to take about 5 minutes, with Mr. Hafen testifying first. I would appreciate it if you can summarize your statements, and after the testimony has been given. we'll have questions by members of the committee who will have some questions.

And I also will keep the record open so that Senators on this committee can submit questions to you which we hope you'll answer as expeditiously as possible.

Dr. Hafen.

STATEMENT OF BRUCE C. HAFEN, PRESIDENT, RICKS COLLEGE, AND PRESIDENT, AMERICAN ASSOCIATION OF PRESIDENTS OF INDEPENDENT COLLEGES AND UNIVERSITIES

Mr. Hafen. Mr. Chairman, the association I represent includes the presidents of about 165 private colleges and universities with a total enrollment of about 330,000 students. Some of these are large universities. Most are small colleges with enrollments under 2,500. Many of our schools are church-related. All are deeply committed as a matter of conscience to the goals of nondiscrimination and equal opportunity in higher education.

Many colleges in our association receive no direct Federal aid, though nearly all admit students who receive student aid. In general, our schools are distinguished from other private colleges by their determined efforts over many years to finance their own operations from the private sector. A principal motivation for this self-reliance has been an intense desire to remain independent of governmental control in order to pursue distinctive educational missions.

I would like to focus particularly today on three areas where I believe the language of S. 2568 needs to be altered. I have submitted a much longer written statement that supports much of what I will say.

But these three things: First, the "recipient" definition simply must be reexamined and restricted. My written statement details a number of major problems caused by the incredible ambiguity and potential scope of that definition. For instance, the term, as presently written, would cause everyone who deals with direct recipients of Federal aid to become indirect recipients themselves, whether that is a private hospital receiving payments for services from medicare funds, a grocery store being paid by food stamps or a private college whose students pay tuition with Social Security benefits.

Moreover, the recipient definition's reliance on an indirect benefit theory brings within its reach every imaginable kind of private or local governmental activity.

As applied to churches and church schools, this intrusion is probably an unconstitutional establishment of religion. In its application to charitable organizations in general, the indirect benefit theory of this bill sets the stage for a future attack upon the entire concept of tax exemption.

For these and other reasons, the bill not only pierces, but leaves gaping holes, in the veil between the public and the private sector as well as the veils protecting federalism. This Nation's commitment to civil rights is a fundamental principle in our democratic structure, but federalism and the distinction between the public and private sectors are also fundamental characteristics of our unique system. There is a crucial ecological balance among these principles. If we pay so much attention to one principle that others are jeopardized, the system itself is jeopardized.

The second area needing an amendment or exemption is religion. The importance of religious liberty, which is itself of course a basic civil right, has been recognized in prior civil rights laws by express exemptions. The current exemption in title IX is an example. But the title IX religious exemption is restricted to schools controlled by a religious organization. This exemption must be broadened. Religious-oriented schools having looser affiliations with a church are entitled to protection as are schools with a general and openly maintained commitment to the relationship between learning and religious faith.

In addition, the bill's broad definition of recipients could also extend to the point of covering churches themselves in cases where a subsidiary entity owned by a church is a direct or indirect recipient of aid.

Third, S. 2568 should include protection for colleges receiving no direct financial assistance but whose students receive aid directly from the Government. As mentioned earlier, the entire concept of indirect assistance in any context as a basis for Federal jurisdiction introduces new and limitless categories of legal recipients, of which the student aid problem is only one example. Particularly pertaining to student aid, consider what happens when a student receives a Federal grant. He can spend that money for a variety of educational purposes, from food and lodging to tuition and tickets to a movie. When a student on a Federal grant pays his tuition, her tuition, who knows whether the tuition is being paid from grant sources or from the student's own funds? Through how many transactions and transferees must we follow a Federal dollar before we have run out of legal recipients?

The reality is, of course, that student aid is to students, who are the primary intended beneficiaries of student aid programs. By educating more of its citizens, the country is benefited.

I would recommend an exemption from the definition of recipient which is narrowly drawn in order to apply only to those schools whose basic educational missions are jeopardized without such an exemption.

Thank you.

[The prepared statement of Mr. Hafen follows:]

Testimony of Bruce C. Hafen
President, Ricks College
and
President, American Association of Presidents
of Independent Colleges and Universities
Before the Senate Committee on Labor and Human Resources
Concerning S. 2568, "The Civil Rights Act of 1984."

June 26, 1984

Mr. Chairman and members of the Committee, I appreciate the opportunity of appearing before you. I am here primarily in my capacity as President of the American Association of Presidents of Independent Colleges and Universities (AAPICU). Additionally, I represent my own school, Ricks College, in Idaho, a private coeducational two-year college enrolling about 6,500 students. I am also interested in S. 2568 from my perspective as a Professor of Law at Brigham Young University. While I claim no special expertise in civil rights law, my publications in scholarly legal journals in the fields of family and constitutional law have been cited by the Supreme Court and by law school textbooks.

I. Background.

My perspective as a witness is centrally concerned with the effect of broadening the application of Title IX to private colleges receiving no direct federal financial grants. The main objective of S. 2568 is to create institution-wide coverage by several civil rights laws in situations where substantial federal aid is already flowing to some part of an institution or organization. I foresee some serious problems in the approach of the Bill to that general goal, and will mention some of those problems today. However, whatever else I may say, I hope my testimony helps you especially to see the severe problems the Bill would create for that tiny fraction of America's colleges and universities which have tried to remain financially independent of government.

A. Description of AAPICU.

AAPICU, organized in 1968, includes the presidents of some 165 private colleges and universities from 40 different states, with a total enrollment of about 330,000 students.[1] Some of these are large universities, such as Baylor, Villanova, and Brigham Young. However, most are small colleges with enrollments under 2,500. Many of our schools are church-related, representing numerous denominations. All are deeply committed as a matter of conscience to the goals of non-discrimination and equal opportunity in higher education. (Parenthetically, we at Ricks College are very proud of the success of our women's track team, which a few days ago won second place in the National Junior College Athletic Association's national finals.) AAPICU is also committed to high standards of academic excellence. Several of our member schools were ranked among the nation's finest colleges — public or private — in the recently reported poll from U.S. college presidents in U.S. News & World Report.[2]

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[1] A membership list is attached to my written statement.

[2] U.S. News & World Report, Nov. 28, 1983, p. 41. Berea College in Kentucky, Furman University in South Carolina, Pepperdine University in California, Whitworth College in Washington, William Jewell College in Missouri, Hillsdale College in Michigan, and Wheaton College in Illinois.

Virtually all of AAPICU's member schools have, until now, admitted students who receive federal financial assistance. However, about 60% of our schools receive no federal aid beyond what their students receive. Even among the other 40%, their direct federal aid represents but a slight fraction of their total operating revenues.[3] In general, the member institutions of AAPICU are distinguished from other private colleges and universities by their determined efforts over many years to finance their own operations totally from the private sector. A principal motivation for this self-reliance has been an intense desire to remain independent of governmental control, in order to pursue distinctive educational missions. How ironic it is for these college presidents to realize today that, if S. 2568 is passed, they will be as completely overwhelmed by the collective cloak of regulation as if they had applied for the maximum possible federal assistance over all these years.

B. AAPICU's Prior View of Title IX.

Before the introduction of S. 2568 and before the Supreme Court handed down its decision in the Grove City case, AAPICU took the position that schools receiving no direct federal aid were not subject to campus-wide Title IX coverage. There were two bases for this view: first, that student aid alone did not make a college a "recipient" of federal aid and, second, that the "program specific" concept limited statutory coverage to the program or activity receiving the aid.

1. Did student aid make a college a "recipient" of federal aid? The Title IX regulations took the position that an institution is a recipient when a student accepts financial aid, evidently on the theory that when an institution indirectly benefits

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[3] Nearly half of the direct aid recipients in AAPICU report their non-student federal assistance is 1% or less of total revenues. About 90% of these recipients report that direct assistance is less than 8% of their revenues.

from aid to one of its patrons, the result is the same as with direct institutional aid.[4] That theory contradicts some very important legal principles well established in other contexts, including those that allow tax exemptions to all charities and those that have allowed aid to parochial schools without amounting to an establishment of religion.[5] It also contradicts the legislative history of Title VI, which the Supreme Court has said may be "crucial to an understanding of congressional intent in 1972 when Title IX was enacted . . . ."[6] Nevertheless, the Education Department's position on the definition of "recipient" in Title IX was ultimately upheld as a matter of statutory interpretation by the Supreme Court in the Grove City case earlier this year. For reasons to be explained later in my testimony, this portion of the Grove City ruling needs to be corrected by congressional action.[7]

2. Program Specificity. The question of whether Title IX as originally enacted embodied coverage that was "program specific" or institution-wide has been the subject of much debate, including debate in these hearings. All but one of the court cases that considered the question upheld the program-specific interpretation after

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4/ Title IX itself forbids sex discrimination under any "program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (emphasis added). The statute does not define "recipient" but the term is defined in the Department of Education's regulations, 34 C.F.R. § 106.2(h) (1983), to include educational institutions that "benefit" from assistance to others. The definition for "Federal financial assistance" is also only found in the regulations. 34 C.F.R. § 106.2(g) (1983).

5/ See text accompanying nn. 35-42, infra.

6/ Grove City College v. Bell, 104 S. Ct. 1211, 1228 (Brennan, J., dissenting).

7/ See text accompanying nn. 62-71, infra.

reviewing the statute and its legislative history.[8] The most significant of these decisions is, of course, the Supreme Court's recent Grove City case.[9]

Yet the view has been vigorously expressed by some members of the current Congress that the House and Senate which enacted Title IX in 1972 obviously intended institution-wide rather than program-specific coverage. It is genuinely puzzling to an outsider that the intent of Congress and the meaning of a powerful new law on a matter of such fundamental importance could be so difficult to establish. The clearest lesson to be learned from this experience is that grave risks accompany the enactment of vague, symbolic laws passed without adequate deliberation on the assumption that somebody will attend later to the details. It is to be earnestly hoped that congressional action on S. 2568 will not be another illustration of that attitude. The current high interest in the subject presents a remarkable opportunity to review the nation's twelve-year experience with Title IX, so that our entire approach to the problem of sex discrimination in education can be updated, clarified, and focused in ways that accurately reflect the factual environment and the intent of Congress. The hasty generalizations reflected in the present approach to S. 2568 fall short of that goal.

8/ See, e.g., North Haven Board of Education v. Bell, 456 U.S. 512 (1982); Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418 (6th Cir. 1982), vacated, 52 U.S.L.W. 3700 (U.S. March 26, 1984) (in light of Grove City College v. Bell, 104 S. Ct. 1211 (1984)); Rice v. President & Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980) (interpreting program specific requirement under section 504 of the Rehabilitation Act); Board of Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969) (interpreting program specific requirement under Title VI). For another view of the judicial precedent, see 104 S. Ct. at 1230-1231 (Brennan, J., dissenting). The only case rejecting program specificity was Grove City College v. Bell, 687 F.2d 684 (3rd Cir. 1982). See also, 117 Cong. Rec. 30155-30157, 30408 (1971) where Congress failed to adopt Senator Bayh's Title IX proposal which did not have a program specific limitation.

9/ 104 S. Ct. 1211 (1984).

C. The Impossible Dilemma of S. 2568 for Independent Colleges.

If S. 2568 should pass in its present form, eliminating the program-specific concept and leaving in place the Supreme Court's broad definition of "recipient," private colleges and universities receiving no direct federal assistance will be subject to campus-wide regulation if only one student on a federal grant should enroll. This situation presents these schools with an impossible choice. There are only two options, neither of which is desirable.

1. Option A — Refuse Admission to Students Receiving Federal Aid. Option A is that schools desiring to remain free of federal regulation must deny admission to any student who would, by being a recipient of a federal grant, make the school a legal "recipient" of federal aid. Colleges that take this position would probably face sharply reduced enrollments, because their students would have such obvious financial incentives to attend elsewhere, where federal funds would be available to them.

It is a tribute to the quality of the educational product offered by independent colleges that they have maintained their enrollments at all during recent years of rising prices and falling enrollments throughout higher education. But it is asking too much, realistically, to expect them to compete not only with the lower tuitions of state supported schools, but also with the federally funded student aid programs not available to their students. The independent schools could try to raise their own student funds, but their costs — because they bear them from private sources only — have already priced many of them out of the market. Private college tuitions average four to five times the amount of average public school tuitions.10/ The impact of this competitive disadvantage is reflected in the report that the number of private sector colleges declined by about 11% in the nine years from 1969 to 1978: 120 closed outright, 40 merged with

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10/ Education Commission of the States, Task Force on State Policy and Independent Higher Education (1977), p. 3.

other independents, and 16 merged with public institutions, for a total decline of 176 colleges. 11/

The attitude of private school supporters toward the idea of creating private grant funds to compete with federal grant funds will also reflect the frustration of being forced to pay four times for the college education of their children: once by supporting public colleges through paying state taxes, once by supporting federal student aid through paying federal taxes, again by paying expensive private college tuition, and still again by paying for private school student aid funds. At some point the camel's back will simply break. Some Option A schools will be brought to that point by lost tuition income, and will simply close their doors. It is not at all unrealistic, therefore, to suggest as a possible subtitle for S. 2568, "the Bill to terminate independent higher education."

Some may question whether any college or university would actually be so concerned about maintaining its independence from federal regulation that it would exercise Option A. Grove City College and Hillsdale College have already made public announcements that they will adopt this position. A recent telephone survey of a sample of AAPICU members asked the presidents of the schools that receive no direct federal aid what they intend to do if S. 2568 passes, making their entire campuses subject to complete regulation on the basis of student aid alone. Of the 58 colleges responding, while 28 indicated they would probably continue to accept students on federal assistance, 29 said they had not yet made a decision, and 1 indicated a definite decision not to accept such students.

One additional consequence of Option A is that it will force independent colleges to exclude, and thus discriminate against, students who need federal aid to obtain higher education. There is a particular irony here, since the students who are most in need of financial assistance due to their disadvantaged backgrounds tend to be

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11/ The Chronicle of Higher Education, Dec. 18, 1978, pp. 7-8.

the same students Congress seeks to help by expanding the coverage of the civil rights laws. It can be reasonably argued that the student being thus helped should be free to take the conscious "risk" of attending an unregulated college, if that is the student's preference.

2. Option B — Better Fed Than Dead. Option B is to accept the full blown umbrella of federal regulations across the entire campus. This prospect would force some schools into an intolerable compromise with their very reasons for existing. [12/] But, some will say, "Better fed than dead."

Further reflection will suggest the foolishness of forcing the nation's last remaining vestige of truly independent higher education into the homogenizing mold of quasi-public schools. The chief educational contributions, as well as the continued survival, of independent colleges and universities are found primarily in their ability to offer unique educational alternatives to those seeking higher education. It is only by defining their educational missions on their own terms that these institutions have attracted both students and private sources of funding. Because Option B forces the loss of such distinctive contributions, American higher education will lose a major source of the initiative and innovation necessary to maintain true pluralism and diversity. Further, the independent schools will themselves thereby lose their primary competitive advantage.

Option B also portends serious economic consequences. For instance, the financial self-reliance of independent colleges has clearly made more public funding available to public sector schools, because the public schools have had less competition from private schools for government funding. That will no longer be true. Moreover, major contributors from the private sector will regret the loss of private education's distinctive character and hence lose interest in supporting it. And, of course, private colleges will themselves have far less incentive to seek help from private sources. It will

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[12/] The reasons why campus-wide coverage under Title IX has this effect are discussed in the text accompanying nn. 44-61, infra.

be all too easy to line up at the federal pay windows, since nothing will be gained by staying away. The aggregate reduction of private sector support for the staggering costs of national higher education under these circumstances should not be taken lightly.

D. Mistaken Assumptions About Discrimination on Private College Campuses.

It should be stressed that the occasion for your Committee's current deliberations is not that new evidence of discrimination or lack of actual commitment to civil rights has been found on American campuses, public or private. There was no allegation or charge of discrimination in Grove City. The HEW administrative law judge in the Grove City case stated that "there is not the slightest hint of any failure to comply with Title IX, save the refusal to submit an executed assurance of compliance with Title IX. This refusal is obviously a matter of conscience and belief." 13/ Grove City College was guilty, not of discrimination, but of independence.

However, the public perception seems to be otherwise. In its story on the subject legislation on May 8, 1984, the Washington Post erroneously stated regarding the Grove City case, "The administration applauded the court decision, which barred a total aid cutoff to Grove City College in Pennsylvania under Title IX of the Education Act of 1972 after it was found that one of its programs discriminated against women." 14/ It should not be so difficult to believe that independent colleges really could oppose allowing the federal government to define the terms of their educational missions, yet at the same time take very seriously their privately held commitments to the goals of equal opportunity in education. 15/

In addition, S. 2568 almost seems to assume there are no other civil rights laws in place to protect the interests of non-discrimination in private colleges and

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13/ Grove City College v. Bell, 104 S. Ct. at 1224 (1984).

14/ "Split Continues Over Rights Bill," Washington Post, May 8, 1984 (emphasis added).

15/ See text accompanying nn. 44-61, infra.

universities. However, all private institutions are subject to Title VII of the Civil Rights Act prohibiting discrimination in employment, and the Retirement and Age Discrimination Act of 1978, prohibiting age discrimination. Private colleges and universities are also subject to numerous other statutes affecting all employers. In addition, these institutions are subject to state civil rights laws and a variety of private legal remedies now arising to enforce nondiscrimination rights.

II. Major Ambiguities in S. 2568.

S. 2568 contains some surprisingly serious ambiguities which have two major effects. For one thing, a witness cannot be sure of either the actual or the intended impact of the legislation, making it very difficult to testify in a realistic way about its implications for independent higher education. The entire Bill is shot through with major uncertainties about its meaning, showing also a compelling need for a more deliberative approach to the legislative process than has been taken to date.

To its most ardent supporters, S. 2568 may look like a 90-yard touchdown pass. Closer inspection will reveal yellow flags all over the field.

This bill has been widely described as a minor amendment intended only to overturn the "program-specific" portion of the Supreme Court's ruling in the Grove City case.[16/] That is simply not true, as persuasively documented in the testimony of Assistant Attorney General Reynolds, who identified such sweeping problems as the Bill's limitless definition of "recipient," its substantial alteration of the entire approach to enforcement of most major civil rights laws, and the perplexing administrative problems it would create.[16a/]

16/ Proponents of S. 2568 have given assurances that its "narrow purpose . . . is to eliminate the inappropriately restrictive interpretation imposed by the Grove City decision and reaffirm the legal safeguards available under these civil rights statutes." (130 Cong. Rec. S4585 (daily ed. April 12, 1984) (joint explanation by Senator Kennedy and Senator Packwood).) Senator Dole has stated that "[i]t is not the intent of the sponsors to break new ground." 130 Cong. Rec. S4590 (daily ed. April 12, 1984).

16a/ See n.18, infra.

There are additional substantive ambiguities affecting private education that cry out for clarification. Consider some examples.

A. Does S. 2568 Expansively Broaden Federal Control Over State Governments, Municipalities, and Private Activity?

AAPICU's interest is primarily in the application of S. 2568 to private education. For that reason, it is beyond the scope of this statement of testimony fully to explore the possible ramifications of the Bill for other portions of the private sector and for the complex system of federalism. However, since it has been recently observed that, "this legislation is barreling through Congress with essentially no opposition," [17/] I desire to register the strongest possible concern about the Bill's potential effects far beyond the realm of education. It is quite possible that issues relating to the appropriate extent of federal authority are more seriously raised by S. 2568 than are issues pertaining only to civil rights. [18/]

B. Does S. 2568 Expansively Broaden the Term "Recipient" to Include Schools Which Enroll Students Receiving General Welfare Assistance?

While the expansive definition of "recipient" in S. 2568 reflects an understandable desire to eliminate all potential discrimination, the trouble with such limitless terms is that they become meaningless, as well as impossible to enforce realistically. Under this definition, would a social security beneficiary attending a private college cause the college to be a recipient of federal aid? What about a student who pays his tuition with earnings from a summer job on a federally funded highway construction project? These are not far-fetched questions, since in both cases the school is as much a

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17/ Finn, "Civil Rights in Newspeak," Wall Street Journal, May 23, 1984. Professor Finn teaches at Vanderbilt University.

18/ For more detailed expressions of this concern, *see id.* *See also* the testimony of Assistant Attorney General, Wm. Bradford Reynolds on the subject legislation before the House of Representatives, May 22, 1984.

"transferee" of federal funds through an "entity or person" as is the case in explicit student aid programs.

Under present law (assuming S. 2568 is not enacted), "federal financial assistance" for purposes of Title IX is confined to assistance "extended under a law administered by the (Education) Department." [19] Since welfare benefits are not administered by the Department of Education, the hypothetical cases mentioned would not trigger coverage by Title IX. In addition, the majority's analysis of the recipient question in Grove City clearly distinguished general-purpose welfare assistance from student aid by noting that "there is no evidence that Congress intended the receipt of federal money in this manner to trigger coverage under Title IX" because "these general assistance programs, unlike student aid programs, were not designed to assist colleges and universities." [20]

There is actually little practical difference in the "benefit" provided to a school between general assistance programs received by students (and spent to defray the cost of attending college) and student aid. However, the legislative background for Title IX also indicates that general welfare assistance would not trigger coverage of private institutions. "Title IX was patterned after Title VI of the Civil Rights Act of 1964," [21] making the legislative history of Title VI "crucial to an understanding of congressional intent in 1972 when Title IX was enacted . . . ." [22] Senator Humphrey, a chief sponsor of Title VI, stated:

> Perhaps the greatest amount of Federal assistance funds goes for direct programs, in which Federal funds are paid directly by the United States to the ultimate recipient, such as social security payments, veterans' compensation and pensions,

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[19] 34 C.F.R. § 106.2(g) (1983).

[20] 104 S. Ct. at 1218 n.13.

[21] Cannon v. University of Chicago, 441 U.S. 677, 694 (1979).

[22] 104 S. Ct. at 1228 (Brennan, J., dissenting).

> civil service and railroad retirement benefits. Contrary to assertions that have been made, title VI will have no practical effect on such programs. . . . It is irrelevant, to the purpose of these acts, what the recipient does with the money he receives. His employees, the customers of his business, or other persons with whom he deals, are in no sense participants in or beneficiaries of these Federal programs. [23]

However, S. 2568 makes several changes which cast doubt on the continued validity of the proposition that civil rights laws relating to federal funding do not create coverage through general welfare assistance. The much-debated "program or activity" phrase in Title VI (and the other statutes involved in S. 2568, which all use these terms) has been held to be the key language showing Congress' intent that general assistance payments not trigger coverage. [24] S. 2568 would remove this language from the statutes, which may suggest an intent to change the former approach to general assistance payments to individuals.

In addition, in place of the "program or activity" language, S. 2568 substitutes "recipient of Federal financial assistance." An extremely broad new definition of "recipient" would also be placed in the statutes, including "any . . . private . . . institution . . . to which Federal financial assistance is extended . . . directly or through . . . a person." The enactment of this language could also be viewed as evidence of intent to extend the application of these statutes to general assistance payments.

Furthermore, while the definition in S. 2568 of "recipient" is taken from language in existing regulations, [25] the new statutory definition omits an important exception for general assistance payments found in the definition of "recipient" in the regulations. In implementing congressional intention that general assistance to "ultimate recipient[s]" will not make "other persons with whom he [or she] deals . . . participants in or beneficiaries of these Federal programs," [26/] regulations under Title VI and section 504 of the Rehabilitation Act contain the following limitation on the definition of "recipient": "but excluding the ultimate beneficiary of the assistance." [27/]

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[23] 110 Cong. Rec. 6544-45 (1964). See also id. at 6562 (statement of Senator Kuchel); Bob Jones University v. Johnson, 396 F. Supp. 597, 602 n.16 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975).

[24] Bob Jones University v. Johnson, 396 F. Supp. 597, 602 n.16 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975).

[25] See, e.g., 34 C.F.R. § 106.2(h) (1983) (Title IX regulations).

The deletion of the "program or activity" language, the broad definition of "recipient," and the omission of the limiting language contained in the regulations from which the definition was taken may well convince a court that Congress was aware of what it was doing and intended the new language to have a broader application than the former understanding and construction of these statutes would permit.

C. Does S. 2568 Broadly Expand Agency Termination Power?

A critical feature of the remedial schemes under Title VI and Title IX is the so-called "pinpoint" termination power of the regulating agency. [28/] The power of agencies to terminate funds is thus limited to the "particular program, or part" of an institution which is not in compliance with the statute or regulations. Senator Humphrey stated in 1964 that this statutory limitation was "designed to limit any termination of Federal assistance to the particular offenders in the particular area where unlawful discrimination occurs. . . . [T]he termination shall affect only the particular program, or part thereof, in which such a violation is taking place." [29/] The rationale behind the

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[26/] 110 Cong. Rec. 6544-45 (1964) (statement of Senator Humphrey).

[27/] 34 C.F.R. § 104.3(f) (1983) (Department of Education regulations implementing section 504). See, e.g., 7 C.F.R. § 15.2(e), 15b.3(f) (1984) (Department of Agriculture regulations implementing Title VI and section 504); 32 C.F.R. § 300.2(g) (1983) (Defense Department regulations implementing Title VI). The Department of Education's Title IX regulations omit this limitation on the definition of a "recipient," 34 C.F.R. § 106.2(h) (1983), presumably because the Department does not extend general assistance welfare-type benefits to individuals.

[28/] 42 U.S.C. § 2000d-1; 20 U.S.C. § 1682.

[29/] 110 Cong. Rec. 12689 (1964). For a summary of the pinpoint provisions of Title VI and Title IX, see Kuhn, Title IX: Employment and Athletics Are Outside HEW's Jurisdiction, 65 Geo. L.J. 49, 64-67 (1976).

"pinpoint" termination power was that "Title VI is not punitive." [30/] In addition, the intent of the program-specific limitation in Title VI "was not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs not tainted by discriminatory practices." [31/]

The sponsors of S. 2568 state that the "bill also retains the requirement that a nexus be established between the discrimination found and any federal funding that is to be terminated or suspended by the administrative agency enforcing the law." [32/] S. 2568 would provide that termination of funds is "limited in its effect to the particular assistance which supports . . ." the noncompliance, [33/] rather than to the "particular program, or part" where noncompliance is found. The term "supports" in S. 2568 is ambiguous and is capable of gutting the pinpoint termination provision currently in the statutes and regarded by original congressional sponsors to be an essential component of the remedial scheme. For example, any time federal funds to one department in a university (or another large organization, such as a state) could be said to effectively increase the funds available to some other department by some amount, it could be said that the federal assistance to a complying department "supports" the noncomplying department and thus funds could be terminated for a department which was in compliance with the statutory requirements. Such an interpretation finds some support in Senators Kennedy and Packwood's statement regarding S. 2568 that the "requirement of a nexus . . . could be direct or indirect." [34/] In addition, since the "program . . . or part"

[30/] 110 Cong. Rec. 6544 (1964) (statement of Senator Humphrey).

[31/] Board of Public Instruction v. Finch, 414 F.2d 1068, 1075 (5th Cir. 1969) (emphasis in original).

[32/] 130 Cong. Rec. 54587 (daily ed. April 12, 1984) (joint explanation of Senators Kennedy and Packwood).

[33/] 20 U.S.C. § 1682 (italicized words are added by S. 2568).

[34/] 130 Cong. Rec. S4587 (daily ed. April 12, 1984).

language limiting the termination power has nothing to do with reversing the Supreme Court's program specificity holding in Grove City, a future court interpreting the change may well conclude that Congress considered and intended to significantly broaden the termination power. Such a significant expansion of the total remedial scheme has ramifications so extensive that clarification of this issue is imperative before action on S. 2568 is taken.

D. Are Parochial Schools or Other Religious Organizations Subject to Federal Jurisdiction Under S. 2568?

Church-related elementary and secondary schools receiving no direct federal financial assistance have tended to be exempt from the coverage of Title IX, even though the schools or their students may receive certain forms of aid from state governments. However, under S. 2568 they could possibly be covered under either of two theories. Under one theory, parochial schools that are organizationally related to a collection of church-owned entities could now be subject to regulation under S. 2568's "trickle down" or "trickle up" [35/] extensions of jurisdiction from one entity to another. For instance, if a Church owns hospitals as well as schools, its schools might be covered when its hospitals receive a federal research grant or perhaps provide services to medicare patients.

Under the "trickle up" aspect of the "recipient" definition, it seems fair to ask also whether the Church itself in this example is subject to regulatory jurisdiction. It would be a "private institution", a "subunit" of which is receiving federal financial assistance "through another person," just as a school is a "recipient" when its students receive aid. This circumstance would also raise the questions discussed below about violations of the Establishment Clause.

Under the other theory, a parochial school receiving any assistance from a state government might arguably be included as an "assignee" of a State receiving federal aid. This would appear to be the case whether or not the funds sent by the State

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35/ See testimony cited at n.18, supra.

to the private school are themselves federal funds, since the State's ability to provide financial assistance to the private school is clearly "supported" by any federal assistance given the State to offset its other educational obligations. In this sense, a State that is assisted in meeting its obligations by a federal grant is much like a student whose federal grant enables the student to pay tuition costs, even if the student uses his or her own funds for tuition and the grant for other expenses.

E. An Unconstitutional Establishment of Religion?

S. 2568 expands on the basic theory of the Grove City case by making all "transferees" of assistance into "recipients" for purposes of statutory coverage. The federal assistance programs involved are, of course, already made widely available to church-related institutions. When these circumstances are examined in light of Supreme Court case law, S. 2568's total blurring of direct and indirect forms of governmental aid that may benefit religious entities probably creates an unconstitutional establishment of religion.

Ever since the first parochial school aid case, Everson v. Board of Education,[36] the question whether governmental aid was extended to the families of school pupils or to the schools themselves has been a critical issue in Establishment Clause analysis. As the Court stated in Everson, "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents. . . ."[37] And in its most recent case on the same subject, Mueller v. Allen,[38] the Court said, in upholding the constitutionality of parents' state tax deductions for school expenses, "It is noteworthy that all but one of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves."[39] Whether aid to parochial schools was "direct" or "indirect" was, then, a crucial distinction in these cases. Aid to students and/or their families has been treated as "indirect", thus making certain forms of such aid constitutional, even though the Court also recognized in *Mueller* "that financial assistance to parents ultimately has *economic effects* comparable to that of aid given directly to the schools attended by their children."[40] However, under the Court's ruling in *Grove City*, the concept of which is greatly expanded in S. 2568, aid to students is regarded as aid to the colleges they attend on an indirect benefit theory. Establishment Clause issues were not raised by the parties to *Grove City*, but an application of its facts to more formally church-related colleges would clearly raise the issue.

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[36] 330 U.S. 1 (1947).

[37] Id. at 18.

[38] 51 U.S.L.W. 5050 (1983).

The test for Establishment Clause violations is much more flexible in the context of colleges and universities than it is in parochial schools. However, the Supreme Court cases upholding governmental aid to church-related colleges have established some fundamental criteria that are probably violated by S. 2568's blurring of direct and indirect aid. The Court has allowed state aid to church-related colleges when the funds were used to construct buildings intended to be used exclusively for non-sectarian purposes on campuses that were not "pervasively sectarian."[41] And in the more recent case of *Roemer v. Board of Public Works of Maryland*,[42] the Court upheld the constitutionality of direct financial aid by a state to a church-related college because it found that the college was not pervasively sectarian and that *secular activities alone were funded by the state aid*. In *Roemer*, the college made an annual accounting of funds received from the state in order to show that these funds had been used only for "secular" activities on the campus.

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[39] *Id.* at 5053.

[40] *Id.* (emphasis added).

[41] *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

[42] 426 U.S. 736 (1976).

If aid to students at church-related colleges and universities is legally regarded as aid to the institutions, the Roemer test cannot be satisfied unless the colleges both keep track of fund uses and can show exclusive secular use. But when a student on a federal grant pays his tuition, who knows whether the tuition is being paid from grant sources or private sources? Students obviously co-mingle their personal funds with grant funds. Through how many transactions and "transferees" must a careful accounting follow to determine secular use? The reality is, of course, that student aid is to students, and student aid alone should not violate the Establishment Clause under the prior cases. The Establishment Clause ramifications of regarding student aid as institutional aid make clear that S. 2568's excessive stretches of logic designed primarily to find more "recipients" for regulatory purposes will cast serious doubt on the constitutionality of all student aid programs that affect church schools.

It could be argued that the religion exemption contained in Title IX might, at least as to that statute, satisfy any Establishment Clause concerns. Such is not the case, however, because Title IX's religion exemption is not a complete exemption from statutory coverage. The exemption is limited to circumstances where application of Title IX "would not be consistent with the religious tenets" of a sponsoring church. More importantly, this exemption intends to avoid undue interference with religious liberty; it is not designed to avoid an unconstitutional establishment of religion.

This potentially significant ambiguity could be resolved by amending the definition of "recipient" in such a way that aid to students is not regarded as aid to institutions. Such an amendment would also be more consistent with the indirect/direct distinction recognized by the Supreme Court in the parochial school aid cases.

F. Putting at Risk the Concepts of Tax Exemptions and Tax Credits?

One of the most far-reaching potential consequences of S. 2568 is that it proceeds from the basic theory that any entity, public or private, state or federal, which receives indirect support from federal financial assistance should be subject to compliance with a broad and stringent range of federal laws as a condition of receiving the indirect benefit. The indirect benefit idea clearly underlies the assumption that aid to students constitutes aid to the institutions they attend. The same idea pervades the Bill's elaborate definition of "recipient," which includes "any public or private agency, institution . . . or other entity (including any subunity of any such . . . entity) . . . to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."

As unlimited as this language is, it is still unrealistic to imagine that it would by itself seriously raise the question whether tax-exempt religious and other organizations are, by virtue of the "support" or indirect benefit they receive from their tax exempt status, subject to the civil rights laws. However, the utter disregard in the language of S. 2568 for the lines that have traditionally marked the boundaries between the public and private sectors or the boundaries between federal and state sectors [43] makes it irresistible to conclude that this law, if enacted, surely brings the nation a major step closer to the day when tax-exempt status may be conditioned on compliance with the federal public policies reflected in not only the civil rights laws, but other major federal legislation. To lump all the categories of the non-discrimination laws together in one breathtaking extension of federal jurisdiction, as S. 2568 does, at least suggests that Congress would one day be willing to condition all tax exemptions on compliance with the terms of "public policy" outlined in this very Bill. That possibility should be cause for sober reflection by all who are interested in the activities of charitable institutions in the United States.

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[43] *See* the testimony of Wm. Bradford Reynolds, n.18, *supra*.

These are only some of the major ambiguities which would result from the passage of S. 2568 after little more than superficial consideration by Congress. Congress could obviously clarify these and other ambiguities in the Bill, but only if it is willing to take adequate time for detailed consideration of a complex statutory scheme that is as intricate as it is significant. S. 2568 is not a proposal that appropriately lends itself to a congressional procedure designed to avoid, rather than encourage, careful scrutiny.

III. Particular Areas of Harm to Independent Colleges from Campus-Wide Coverage of Title IX.

Even if one reads the areas of ambiguity narrowly, substantial harm is still done by S. 2568 to independent institutions receiving no federal aid beyond what their students receive. This harm arises primarily from the extension of campus-wide coverage under Title IX. Without S. 2568, of course, coverage would be limited to the financial aids office.

A. The Costs of Compliance.

Even under prior anti-discrimination laws (which have carried a smaller compliance burden than is contemplated by S. 2568), and even at large public universities (which have received federal funding to help pay the administrative costs of compliance), "[t]he cost of implementing federally mandated social programs at the university level has been estimated at five to eighteen percent (5-18%) of tuition revenues, which exceeds the total amount of all voluntary giving to institutions of higher education in the United States." 44/

44/ D. Oaks and C. Durham, "Constitutional Protections for Independent Higher Education: Limited Powers and Institutional Rights," in Accountability — Keeping Faith With One Another, p. 69 (National Congress on Church-Related Colleges and Universities, 1980).

The proposed Bill would increase this already crushing task by expanding the compliance obligation across an entire campus, regardless of the kind or extent of any federal funding. This means a college receiving no federal assistance other than student aid would receive no additional help from government or other outside sources to pay for the new campus-wide layer of trained personnel and intricate procedures necessary to satisfy its compliance duties. Not only would this unfunded new duty cover all educational activities, it would evidently cover all non-educational functions of a college as well. Even beyond this, S. 2568 gives all federal funding agencies authority to regulate all of a college's programs, so that the compliance burden is conceivably multiplied in geometric proportions.[45]

The prior philosophy in all four of the statutes affected by S. 2568 was that there should be some kind of rational relationship between (1) the amount and extent of federal aid received by an institution and (2) the amount and extent of the regulatory and compliance burden. That was one of the reasons why supervisory and enforcement authority was limited by the statutes to the program or activity that actually received the federal assistance.

One wonders not only about the source for the personnel and the budget needed to sustain these vast new costs at colleges and universities, but also where the personnel and budget will come from to sustain the concomitant supervisory and enforcement burden inevitably to be felt by federal agencies. In a day when both higher education and government have been nearly panic stricken over their own financial deficits, it is not hard to wonder whether the Congress is acting with a full consciousness of its actions.

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[45] This fact and some of its implications are addressed in the House testimony of Assistant Attorney General Reynolds, supra n.18, and in the text accompanying nn. 16-34, supra.

The limited resources of the small, independent colleges of AAPICU may make it virtually impossible for them to fully shoulder their compliance duties. Their only answer may be to ask for additional federal funds to cover compliance costs. Then not only do national educational costs increase, but the claim that these schools are truly independent of the federal government really is destroyed — not because the schools are dependent on government for educational purposes, but because they are dependent on government to satisfy the government's purposes.

B. The Costs of Yielding Educational Independence.

There may be some people today who assume the only reason a private school would pursue an independently defined mission is to cover up some kind of invidious discrimination. That idea would not be seriously entertained by those who know, even superficially, the history of education in this country or the theory of democratic pluralism on which our entire political system rests. Our educational system — especially at the level of higher education — has long reflected and cherished the diversity that is so natural and so healthy in a democratic system. For centuries, the landscape of U.S. higher education offered a rich variety of colleges and universities, each a one-of-a-kind reflection of the unique vision of its founders. Many were funded by churches seeking to provide a well-grounded education within the context of their religious principles. Different schools had different characters.

This diversity manifested a deeply-held ideal that individuals and institutions should be permitted to pursue the goals of education in their own ways. Some colleges believed that the educational process can best take place where the student body is limited to one sex or the other; others, where religious devotion is integrated with secular learning; others, where learning is totally secularized; others, where social interaction and recreation are restricted; others, where social interaction and recreation are encouraged; others, where technical and vocational skills are emphasized; and still others, where a devotion to classical liberal arts education is so complete that student preoccupation with careers is thought to be inappropriate.

Which of these approaches is correct? The government of the United States does not know, nor should it try to decide with finality. Like the economic marketplace, the marketplace of ideas is well-served by divergent approaches and brisk competition. In addition to offering the consumer a wide array of choices, the competitors learn from one another and the entire marketplace is improved. Perhaps more significantly, the variety and individual integrity of such diverse approaches comes close to the heart of the nation's cherished belief that each man or woman should be free to define the meaning and purpose of his or her own life. That freedom includes a student's right to choose his or her own approach in a college education.

When the advocates of any single set of social issues or any single view about the "best" educational environment, or the "best" approach to education for the members of either sex, would seize the power of law and government to impose their views about educational philosophy and methods to the exclusion of all others, there is something wrong with our collective understanding about the place of education in promoting different individual paths and choices in the pursuit of personal meaning.

Being more specific about the reasons why private (especially religious) colleges have cherished privacy, consider the thoughts of Mr. Justice Jackson in a 1947 Supreme Court opinion: "I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church . . . . Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests." 46/ Yet it was precisely because he so well understood the nature and purpose of parochial schools that Justice Jackson in that

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46/ Everson v. Board of Education, 330 U.S. 1 (1947) (dissenting opinion).

same case gave this warning, which in today's context seems so relevant: "If the state may aid these religious schools, it may therefore regulate them." [47] .

But the Supreme Court has consistently believed the state *should not* regulate religious schools. The case from which these lines are taken marked the beginning of a long and frustrating struggle in the Supreme Court and elsewhere about the best way to encourage private, church-related education without undermining the independence which is its lifeblood, yet also without undermining our constitutional commitment to the idea that government should not establish religion. Now, many years, many state legislative enactments, and many Supreme Court cases later, a few principles have been developed by which the Court has struck a workable balance between the competing concerns. Regulation by the states of a kind that would irreparably damage the religious character of the parochial schools has been avoided. Inappropriate levels of financial aid to church-related schools have been avoided. Many problems, including large financial ones, remain. But the cause of the parochial schools has been accommodated within our constitutional framework. The distinction between direct and indirect aid has been vital. [48] Through it all, we seem to have believed what the Supreme Court said in 1925 about the right of private schools to exist with a restrained sense of state accommodation alongside the public schools: "The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." [49]

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[47] *Id.*

[48] *See* text accompanying nn. 36-42, *supra.*

[49] *Pierce v. Society of Sisters,* 268 U.S. 510, 534 (1925).

At the level of higher education, there are many reasons why independent and church-related colleges and universities have struggled and floundered in an increasingly secularized society. But one of the primary causes of their decline as a serious educational force in recent years has been their inability to obtain necessary financial sustenance. Tuitions can only rise so high, and then they are out of reach for most of those who desire a private education. The federal government has recognized the growing financial plight of all of America's colleges and universities, and remarkable increases in federal student and other financial aid have blessed the entire nation in the last several years. But we have taken an approach to student financial help for students desiring to attend private religious colleges that has somehow misunderstood the need to provide necessary resources without at the same time forcing the independent schools into some monolithic, quasi-public mold that compromises their entire reason for existing as an alternative to the public colleges and universities.

The patterns of financing have, of course, been only one factor in the increasing homogenization of higher education. But whatever the causes, both the nation and the overall cause of higher education are badly served by measures that destroy our system's few remaining vestiges of diversity and pluralism. As long ago as 1971, the distinguished Report on Higher Education prepared by the Newman Commission and distributed through the U.S. Office of Education observed as its basic criticism that our "system of higher education as a whole is now strikingly uniform." The Commission found that college students have a choice:

> not . . . between institutions which offer different modes of learning, but between institutions which differ in the extent to which they conform to the model of the prestige university . . . . If . . . one believes that an important function of the higher education system is to offer alternative models of careers and roles, including those which challenge and change society, then the homogenization of higher education is a serious problem.

For students who will be frozen out of private colleges that are unable to admit anyone receiving personal federal aid, the message of this report is particularly unsettling. A student may be attracted to a private college or university precisely because of its distinctive environment and independent spirit, despite its higher tuition. But because of the student's or the parents' income level, federal assistance might be necessary for him or her to attend. What benefit is there to the student if that assistance is withheld? What damage is done to the possibility of providing every young man or woman who desires it a college education consistent with his or her own choice among all the educational models of social, intellectual, and spiritual life?

These thoughts on why independence matters to the nation's private colleges and their students are offered primarily to show that there are legitimate countervailing interests at stake that deserve a complete hearing in the understandable quest to extend civil rights jurisdiction to the uttermost limits. When no questions about those limits are asked, let alone thoughtfully answered, the nation pays a heavy price in terms of the variety and quality of American education that is available.

As observed by the Carnegie Council, "the special contributions of independent colleges and universities depend in large measure on their ability to operate as autonomous institutions, subject to a minimum of governmental control . . . . There is a danger that federal and state regulations may go so far as to deprive those institutions of the freedom and flexibility needed to perform their missions properly." [50/] Surely a way can be found to accommodate (1) the need for independent colleges to remain independent with (2) the rights of students both to financial aid and to choose their own kind of college education.

C. Special Concerns Under Title IX for the College with a Religious Mission.

1. The General Problem. Church-related institutions and other colleges with an essentially religious orientation have been deeply concerned since its

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[50/] Quoted in Dallin H. Oaks, "Facing the Future: A Distinctive Role for the Church-Related College," National Congress on Church-Related Colleges and Universities, Notre Dame University, June 22, 1979.

enactment about the impact of Title IX on their overall religious liberty. There is a qualified exemption in the statute providing that the law does not apply when its application "would not be consistent with the religious tenets" of "a religious organization" which "controls" an educational institution. However, many colleges and universities which have strong institutional commitments to religiously based moral values are not protected by the exemption, because they are not formally "controlled" by a religious organization.

Even for controlled institutions, the exemption leaves the burden of proof on the college to convince the Department of Education that there is in fact a "specific tenet of the religious organization" [51/] at stake in a particular situation and that it conflicts with the application of some portion of the law or regulations. Because this procedure leaves questions of interpreting religious doctrine in governmental hands, its constitutionality as well as its wisdom is questionable.

With S. 2568 expanding the coverage of Title IX across an entire campus, even when there is no federal assistance other than aid to students, concerns about conflicts with religious liberty principles are correspondingly expanded.

Not only the religion clauses but the entire spirit of the First Amendment protects a private institution of higher education from being forced to redirect its distinctive educational mission and environment to meet ends chosen by government. In this sense, educational institutions share the fundamental values of the First Amendment with the press, with religious institutions, and with our political institutions, which thrive through the protections given free and robust political discourse. [52/]

Within the protection of the First Amendment, church-related schools have played a particularly important role as "mediating structures" between the individual and

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[51/] 34 C.F.R. § 106.12(b).

[52/] See text accompanying nn. 78-84, infra.

the larger society, especially as the State has loomed larger in its role. Modern civilization is soaked through with a sense of anomie and alienation, heightened by feelings of helplessness against ever increasing concentrations of power in such "megastructures" as the boundless government bureaucracy, the business conglomerate, and the national labor union.[53] In the midst of all this, increasing attention is being given to the personal and the public policy significance of such "mediating" structures as families, neighborhoods, churches, and voluntary associations:

> Without institutionally reliable processes of mediation, the political order becomes detached from the values and realities of individual life. Deprived of its moral foundation, the political order is 'delegitimized.' When that happens, the political order must be secured by coercion rather than by consent. And when that happens, democracy disapears.
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> The attractiveness of totalitarianism . . . is that it overcomes the dichotomy of private and public existence by imposing on life one comprehensive order of meaning. 54/

Mediating structures are "the value-generating and value-maintaining agencies in society."[55] Therefore, when these structures are inactive, society must look to the megastructures — notably the State — as a source of values. The totalitarian State gladly and aggressively assumes that role. The democratic State, on the other hand, makes no claim to be a source of personal meaning and values, nor would we allow it to. That role contradicts the assumptions on which our entire political system rests.

The family is for many people the major mediating and value-generating institution within the private sphere.[56] Therefore, attitudes about family life, marriage, children, and the relationships between men and women are among the core

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53/ P. Berger & R. Neuhaus, To Empower People: The Role of Mediating Structures in Public Policy (1977).

54/ Id. at 3 (emphasis added).

55/ Id. at 6.

56/ This subject is enlarged upon within the constitutional context in Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests, 81 Michigan Law Review 463 (1983).

attitudes of life. Church colleges and universities, freely chosen as private institutions by the students who attend them, have traditionally regarded attitudes about family life and related value questions as central to the concerns of their students. Thus these schools have, as matters of both educational and religious philosophy, played a vital role in augmenting their students' own family and religious life in the process of value formulation and value transmission regarding family-oriented matters.

Attitudes about marriage and family are only one example of many value laden subjects that play an important role in the community of a church-related college. There are many other ways in which these colleges assume the role of mediating structures in the lives of their students. In this role, church schools act very differently from public schools, because state schools are extensions of the democratic state — itself part of the larger megastructures.

In general, Title IX, as broadened by S. 2568, would tend to establish an official orthodoxy about value questions relating to the roles of the sexes in society, matters of sexual morality, and attitudes about marriage and family life. There are many strongly held views on these issues in contemporary society. They are far from the category of settled questions. On the contrary, they are exactly the kinds of issues Justice Jackson had in mind in his celebrated statement from the flag-salute case: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." 57/

Intrusive laws and regulations relating to family life and sex roles can be harmful to church-related colleges in two ways. One way is for the state to assume for itself the value transmission role by imposing, in a nearly totalitarian way, "one comprehensive order of meaning" about such personal questions. The other way is for the state

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57/ West Virginia Bd. of Education v. Barnette, 319 U.S. 624 (1943).

to imply by its regulatory authority that the nation's official and legally enforced value position about the role of the sexes is one of unisex neutrality, which is itself a value position so potent that it seems to mark any contrary view as illegitimate. Either way, a chill comes over the campus atmosphere and the very soul of a church college is threatened. Church-related colleges and universities desire independence not so they can discriminate, but so they can be discriminating — about many of life's ultimate questions.

2. Illustrations of Specific Concerns. Consider now a few specific examples of the way Title IX, as broadened by S. 2568, inappropriately intrudes on religious and moral values. The current Title IX regulations appear to require schools to be blind to the occurrence of abortion or extramarital sexual activity in decisions relating to school policies or student discipline. 58/ Yet many religiously oriented and other institutions believe there are serious moral principles at stake in such student behavior. Their commitment to these principles is unquestionably undermined by regulations that prohibit inquiries into or actions based upon marital or parental status, pregnancy or termination of pregnancy. 59/

It is unclear whether Title IX permits college teachers and counselors to talk with students about ways in which marriage may be compared to career choices or even personal student preferences. The regulations prohibit counseling students in ways that "permit or require different treatment of students" on the basis of sex. 60/ They also require that when "substantially disproportionate" numbers of one sex choose voluntarily certain courses of study or are classified by counseling and vocational testing materials

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58/ 34 C.F.R. §§ 106.21(c), 106.40(b)(1), 106.40(b)(5), 106.57(b) (1983).

59/ In addition, colleges which stress high moral values and modesty may object to regulations which prohibit separate sex education classes, 34 C.F.R. § 106.34 (1983), and separate physical education classes (although separating the sexes within a physical education class is permitted in sports which primarily involve physical contact). Id. at § 106.34(c).

60/ 34 C.F.R. § 106.36(b).

in particular courses or classifications, the school must take affirmative action to ensure that the disproportion is not the result of sex discrimination in academic or other counseling.[61/] The chilling effect of this legalistic approach on sound academic and career counseling is especially noticeable when that counseling is placed in the larger context of student-teacher conversations in a church-related college about life's goals and larger purposes. Are some career choices more compatible with marriage goals than others? If so, is that question off limits in counseling for students for whom it is an important issue? What if there are religious attitudes about the significance of marriage that enter the counseling environment?

Sex-segregated housing for single students is allowed up to the point of maintaining "separate living facilities." But this language is uncertain enough to make it difficult for institutions to know how to govern their affairs in this highly sensitive area.[62/] If, for example, women generally prefer dormitories with cooking facilities while men prefer dormitories with cafeteria facilities, how is a college housing office to ensure there has been no discrimination in dormitory assignments? Suppose a college administration prefers to have dormitory buildings or wings segregated on the basis of sex. Does that constitute "separate living facilities"? When in doubt on such matters of judgment and interpretation, who should have the burden of proving whether there is discrimination — the college or the government?

Church-related schools and other colleges holding strong value orientations are often troubled that federal agency procedures tend to allow the "judgment call" issues in the sex discrimination area to be resolved in favor of agency discretion. Justice White has aptly observed that "the word 'discrimination' is inherently . . . ambiguous."[62a/]

[61/] 34 C.F.R. § 106.36(c).

[62/] 34 C.F.R. § 106.32.

[62a/] Guardians Association v. Civil Service Commission of the City of New York, 103 S. Ct. 3221, 3227 (1983).

The particular term "sex discrimination" is even more ambiguous, because some distinctions between males and females are inherent in nature. Whether those distinctions should be the basis for conclusions of illegal "discrimination" is unavoidably a matter of subjective judgment. It is the established practice of Congress to delegate such discretionary decisionmaking to federal agencies, often pursuant to vague statutory language — of which Title IX is a notable example. The Supreme Court allows broad agency discretion, giving regulations the force of law so long as they are "reasonably related to the purposes of the enabling legislation." 62b/ Thus, as a practical matter, future innovations and requirements under the heading of sex discrimination in education are limited only by the imagination of the Department of Education.

This means that a matter of conscience and belief having importance to a small, private college, but which may easily seem trivial to others, may require expensive litigation to ensure protection. When such First Amendment interests as religious liberty are involved, however, the presumption should be the other way: the college's judgment should prevail unless a given practice is shown to have harmful discriminatory effects.

For example, a former Title IX regulation provided that an educational institution could not "discriminate against any person in the application of any rule of appearance." 62c/ Pursuant to this rule, HEW decided that dress and grooming codes could not require different hair lengths of men than of women. One church-related university made enough of the issue in a formal exchange with the Office of Education that a gender-based hair length standard was allowed under Title IX's religious

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62b/ Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973). See generally K. Davis, Administrative Law Treatise § 7.8 (2 ed. 1980 and Supp. 1982).

62c/ 45 C.F.R. § 86.31(b)(5) (1976).

exemption.[62d/] In another case, it took a court ruling to invalidate the regulation as applied to a particular appearance code.[62e/] Eventually the regulation was rescinded; but the expense and effort in such cases has been enough to make independent schools very uneasy about the future prospects of needing to formally defend themselves when the procedural presumption is already against them. Whether the future issues involve regulating the content of textbooks or reviewing approaches to classroom instruction, the effect of being put so severely on guard simply has a chilling effect that subtly undermines a religious school's pursuit of its educational mission.

IV. Limitations on Federal Regulatory Power.

S. 2568 seems to assume there are no significant constitutional or policy reasons for restraining the reach of federal regulatory authority. However, there are several important reasons why Congress should consider the need for its own self-restraint before enacting this Bill, which proposes unusually bold extensions of federal power.

A. Limitations on the Spending Power.

The general rule regarding congressional authority is axiomatic under our theory of limited government: Congress must have some constitutional basis for its legislative enactments. Otherwise, this Bill could simply provide that no American shall discriminate against any other in any way. The authority for S. 2568 is obviously derived from the spending power, which gives Congress the right "to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."[63/]

[62d/] Correspondence between Martin H. Gerry, Director, Office for Civil Rights and Dallin H. Oaks, President, Brigham Young University (1976).

[62e/] Trent v. Perritt, 391 F. Supp. 171 (D. Miss. 1975).

[63/] Grove City College v. Bell, 104 S.Ct. 1211, 1223 (1984) (emphasis added).

Reasonable people cannot quarrel, as a matter of public policy or logic, with the assumption that any governmental agency has the responsibility and the right to verify that public funds are spent for the purposes for which expenditures were authorized. This natural principle of accountability also assumes that "funds should not be expended in ways that run counter to legitimate government objectives, such as assuring that government property and facilities acquired with government financing are used without unlawful discrimination." [64/] However, in today's society, when virtually every public or private transaction is touched in some way by the ripple effects of federal spending, and when federal power seems far more potent than any other source of influence, there are enormous temptations to misuse the spending power. But if that power is manipulated to become a trojan horse in every office or conversation where the influence of federal spending is felt, it will quickly establish a unitary sovereignty that destroys crucial checks and balances by eliminating both federalism and the private sector.

Thus, the power to condition the receipt of federal funds on specified obligations is not unlimited, as both the Congress and the Supreme Court have long recognized. Congress has in the past been sensitive to the need to attach "reasonable" conditions to the receipt of federal funds. In enacting Title VI, and in subsequent civil rights legislation, Congress was careful to apply the regulatory scheme only to the specific program or activity receiving federal financial assistance, and to narrowly define the concept of recipient. [65/] Its purpose was arguably to ensure that the receipt of federal funds be accompanied by conditions that are directly and reasonably related to the objectives of the grant program itself.

[64/] D. Oaks, "Facing the Future: A Distinctive Role for the Church-related College," National Congress on Church-related Colleges and Universities, Notre Dame University, June 22, 1979.

[65/] *See infra*, text accompanying nn. 102-121.

The Supreme Court has also recognized substantial constitutional limits on the spending power. The most recent and most applicable formulation of the test establishing such limits comes from Grove City:[66/]

> Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. E.g., Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694 (1981). Grove City may terminate its participation in the BEOG program and thus avoid the requirements of § 901(a). Students affected by the Department s action may either take their BEOGs elsewhere or attend Grove City without federal financial assistance.

All of the operative terms in this test present problems for S. 2568. First, the conditions attached by the Bill to the receipt through student aid only of federal financial assistance by a private, independent college are no longer "reasonable." This is because removal of the "program specific" concept and the use of a virtually unlimited definition of "recipient" arguably destroys the needed rational connection between (1) the conditions imposed and (2) the purposes of the various forms of aid capable of triggering recipient status. It really is unreasonable to think that one federal grant to one student would alone justify the full burden of compliance with the intrusive regulations under these statutes.

Second, the conditions attached to the federal financial assistance under S. 2568 are very "ambiguous." Among many other major ambiguities,[67/] it is not at all clear which forms of federal aid have the Title IX regulatory burden attached.

Also, the combination of Grove City and S. 2568 make it possible that private, independent colleges and universities will become "obligated to accept" certain forms of federal financial assistance capable of bringing the institution under the rule of Title IX. For example, under S. 2568's definition of recipient, it is quite possible that a

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[66/] 104 S. Ct. at 1223.

[67/] See Section II, supra.

student receiving welfare-type benefits would trigger "recipient" status for the university that he or she attends.[68] Under these circumstances, a college might have no idea which of its students could, by the act of enrolling, subject the college to federal jurisdiction.[69] The college could therefore be "obligated to accept" the federal financial assistance with no realistic way to "avoid the requirements of the law."[70] For these reasons, S. 2568 may fail the spending power test explained in Grove City.

For its general statement of the scope of the spending power, the Court in Grove City cited Pennhurst State School & Hospital v. Halderman.[71] That case involved application of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (the Act).[72] Halderman, a minor, retarded resident of Pennhurst (a state-owned and operated facility for the disabled) sued in a federal district court class action alleging unsanitary, inhumane conditions in violation of her civil rights, and specifically her rights under the Act. The Court of Appeals found that the Act created substantive rights in favor of the mentally retarded, that mentally retarded persons have an implied cause of action to enforce those rights, and that conditions at Pennhurst violated those rights.

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[68] See Section II.B., supra.

[69] It is doubtful that a college attempting to maintain its independence by refusing admission to students receiving general assistance payments could even identify such students. The federal agencies administering such programs, with the exception of the Department of Education, are prohibited by statute from disclosing identifying information. 5 U.S.C. § 552a(b). State agencies participating in federal welfare programs are also instructed to restrict such information to agency personnel involved in the administration of the welfare program. See, e.g., 7 U.S.C. § 2019 (food stamps). Without voluntary disclosure by the student, it is difficult to see how the college could identify the students receiving such aid for the purpose of excluding them. If students receiving aid other than student education grants and loans can trigger regulation of the university (a result arguably permitted by the language of S. 2568, see Section II.B.), then the university is caught in the position of indirectly receiving federal financial assistance which it cannot identify or avoid.

[70] Grove City, supra, 104 S. Ct. at 1223.

[71] 451 U.S. 1, 17 (1981).

[72] 42 U.S.C. § 600 et seq. (1976 ed. and Supp. III).

The contrary argument was that in receiving federal funds for the handicapped under the Act, the State had never obligated itself to the affirmative duties which the Court of Appeals had found; specifically, the right to "appropriate treatment" in the "least restrictive" environment. In analyzing whether receipt of funds under the Act carried with it these affirmative duties, the Supreme Court developed the following test:

> Turning to Congress' power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. . . . Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . [emphasis added]. There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation. [73]

Pennhurst also cited Fullilove v. Klutznick, [74] which stated that the spending power requires Congress to impose conditions that are "narrowly tailored" to the achievement of the legislative goal. [75] The Pennhurst and Fullilove tests pose some serious difficulties for S. 2568, again because the Bill is such a study in ambiguity.

For example, the language as presently drafted leaves it far from clear what a college must avoid to preserve its independence. A college could become a recipient of federal financial assistance without "knowingly" or "voluntarily" receiving any federal aid, by the unilateral actions of its students. There is no way to determine with certainty who is a "recipient" under the terms of the Bill, nor which forms of federal financial assistance carry what consequences. It may not even be possible to avoid these consequences once they are determined.

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[73] Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981) (emphasis added).

[74] 448 U.S. 448 (1980).

[75] 448 U.S. at 480.

These uncertainties are created as well as compounded by the way S. 2568 subjects each individual "recipient" to the jurisdiction of multiple federal agencies. As one scholar who examined the Bill observed, "Assistance of any kind to any part of any public or private enterprise will trigger all the civil rights regulations and enforcement procedures of all the cognizant federal agencies with respect to all other parts of the enterprise, however remote they may be from the part being aided."[76/] Different federal agencies have established different tests for measuring compliance. Thus, for educational institutions to be aware of the expectations of the Education Department will no longer be sufficient. Moreover, "[m]any federal agencies have long since built into their antidiscrimination regulations and procedures various 'effects' tests, quotas and other 'outcome' standards that may foster reverse discrimination."[77/] Some of these tests may have been established in an especially demanding regulatory context, such as racial discrimination, making it unclear whether those same tests will apply to other forms of discrimination as determined by agencies having different enforcement objectives. The net result of the Court's analysis in Grove City, Pennhurst, and Fullilove is that S. 2568 has great difficulty in satisfying the basic requirements for a valid exercise of the spending power. Those basic requirements include the need for reasonable and unambiguous conditions, voluntarily and knowingly accepted with a complete view of the consequences.

76/ C. Finn, "Civil Rights in Newspeak," Wall Street Journal, May 23, 1984.

77/ Id.

B. The Spending Power, The First Amendment, and "Unconstitutional Conditions."

There is an alternative line of reasoning which also acts as a limit on the spending power, known as the doctrine of "unconstitutional conditions." 78/ Under this doctrine, governmental entities may not condition access to funds or other benefits in ways that force potential recipients to sacrifice a constitutional right in order to obtain the benefit. This is particularly true when the public benefit is vital. As explained by the Supreme Court:

> If the state may compel the surrender of one constitutional right as a condition of its favor it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence. 79/

Although this doctrine originally developed in the context of foreign corporations seeking to enter a state to do business, it has long since been applied in other contexts, including receipt of welfare-related benefits. 80/

The major constitutional provision which would, under the doctrine of unconstitutional conditions, limit the spending power in favor of independent colleges and universities is the cluster of freedoms associated with the First Amendment. The Supreme Court has been particularly adamant in its refusal to sustain conditions upon public benefits if they "inhibit or deter the exercise of First Amendment freedoms." 81/ As expressed by two constitutional law scholars:

> Since independent colleges — especially church-related ones — are intimately involved in the assertion, cultivation, and

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78/ See L. Tribe, American Constitutional Law 510 (1978).

79/ Frost & Frost Trucking v. Railroad Comm'n, 271 U.S. 583, 594 (1926) (a case involving an attempt to require a private trucker to become a common carrier as a condition to using the highways, where the state had the acknowledged power to prohibit the use of the public highways in proper cases).

80/ Sherbert v. Verner, 374 U.S. 398 (1963).

81/ Id. at 405 (1963).

> transmission of First Amendment values, they are uniquely situated to avail themselves of the doctrine of unconstitutional conditions. Whatever additional constitutional rights might be relevant to the protection of various aspects of the life of a university community, it is clear that a variety of First Amendment values — freedom of speech, of association, and often, of religion — are central. Indeed, as one author has expressed it, the university is "the principal institutional focus of American intellectual life. . . . The university is, in sum, the single institution in American society that exists solely to nurture and pursue values enshrined in the First Amendment." 82/

And in one of the most oft-cited statements of the Supreme Court on academic freedom, Justice Frankfurter underlined the conditions that make universities protected fountainheads of pluralism: "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the 'four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." 83/ When this general interest is buttressed by genuine religious liberty interests, it is a matter of no small constitutional significance.

For those institutions whose very purpose is to nurture and sustain First Amendment values (newspapers, churches, and universities), regulation of the institution itself also creates an impermissible "chill" on the First Amendment rights of those within its institutional framework. The chilling effect of heavy regulation takes on increased significance when a private college nurtures religious values, even if it is not "controlled" by a religion. In addition, small, independent colleges and universities, often comprised of students who share many common values, reflect decisions by their students to exercise their rights to freedom of association by enrolling in such a school. This trilogy of First Amendment freedoms (speech, religion, and association) together with the private,

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82/ C. Durham & D. Oaks, supra n.44 at 76 (citation omitted).

83/ Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957).

independent status of such schools, means that the buffer zone protecting these freedoms should be quite large. If "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny," [84/] then any regulation of institutions impacting upon freedom of speech, religion, and association would also require the highest level of scrutiny.

In summary, under the doctrine of unconstitutional conditions, Congress' power to attach limits on federal assistance to private colleges and universities is limited by the First Amendment. Such conditions must be narrowly tailored, and not have a chilling effect on First Amendment freedoms. This is particularly true where the federal financial assistance comes to the university in the obtuse fashion contemplated by S. 2568.

C. Federalism as a Limitation on Congressional Authority.

With respect to its effect on state and local governments, S. 2568 is intrusive to an extreme degree. As outlined by Assistant Attorney General Reynolds, the problem stems from the Bill's almost limitless definition of "recipient." The definition provides that "when Federal financial assistance is extended to a 'subunit' (not defined) of a larger 'entity' (not defined), the larger entity itself — whether it be public or private — can be viewed as the 'recipient' if it is deemed to have 'receive[d] support from' (not defined) the federal funds going to the subunit." [85/] This definition covers *all* the subunits of a state if any subunit of the state receives any aid. "Since there is no state that can claim it operates entirely free from Federal financial assistance, the extent of federal intrusiveness into state and local affairs under H.R. 5490 [the House companion bill to S. 2568] seems to be virtually complete." [86/]

[84/] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958).

[85/] *See* n.18, *supra*.

[86/] *Id.*

In addition to increased scope, the enforcement provisions for both governmental and private litigants are greatly expanded. Every state and local government entity will be subject to the jurisdiction of every federal agency which extends federal financial assistance to the state or one of its subunits.

The power of Congress with respect to state governments is not limitless. In National League of Cities v. Usery [87] the Supreme Court struck down Congress' attempt to extend the wage and hour provisions of the Fair Labor Standards Act to state and local governments. Sensitive to concerns of state sovereignty, the Court drew from the Tenth Amendment an "affirmative limitation on the exercise of [congressional power under the Commerce Clause] akin to other commerce power affirmative limitations contained in the Constitution." [88] This was grounded in a concern that the imposition of intrusive federal regulations on state governments would "allow 'the National Government [to] devour the essentials of state sovereignty.' " [89]

This Tenth Amendment limitation on the Commerce Clause was further articulated in Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc., [90] which involved a pre-enforcement challenge to the constitutionality of the Surface Mining Control & Reclamation Act of 1977 (SMACRA). SMACRA required a regulatory program for surface mining to be proposed by the state, consistent with minimum federal standards, or adoption by the state of the federal program. The Court in Hodel developed a test for Tenth Amendment challenges to Commerce Clause statutes, and under that test upheld SMACRA:

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[87] 426 U.S. 833 (1976).

[88] Id. at 841.

[89] Id. at 855 (quoting Maryland v. Wirtz, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting)).

[90] 452 U.S. 264, 286-288 (1981).

> "[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of National League of Cities must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States.' Second, the federal regulation must address matters that are indisputably 'attribute[s] of state sovereignty.' And third, it must be apparent that the States compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' " 91/

For statutes that satisfy each prong of this test, a final inquiry requires weighing whether "the federal interest advanced is such that it justifies state submission." 92/

Finally, in EEOC v. Wyoming 93/ the Supreme Court re-emphasized the Hodel test in a case involving a challenge (under the Age Discrimination in Employment Act of 1967) to a Wyoming statute requiring the retirement of state Fish and Game Department wardens at age 55. The Court upheld application of the Age Discrimination in Employment Act to the states. It distinguished National League of Cities based on the differing levels of intrusiveness, focusing on the third prong of the Hodel test.

Taking these three cases together, it is probable that S. 2568 would not survive a Tenth Amendment challenge.

First, the bill regulates the "States as States," satisfying the first prong of the Hodel test.

Second, at least with respect to Title IX and perhaps with Section 504 of the Rehabilitation Act of 1973, the bill regulates "matters that are indisputably attributes of state sovereignty." Although the Supreme Court has not clearly defined this concept,

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91/ 452 U.S. at 287-288 (citations omitted; emphasis in original).

92/ Id. at 288 n.29, citing Fry v. United States, 421 U.S. 542 (1975); National League of Cities, supra, at 856 (Blackmun, J., concurring).

93/ 103 S. Ct. 1054 (1983).

education has without question traditionally been regarded as a matter of state sovereignty.[94]

Third, it is "apparent that the states' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' "[95] The Court explained in *EEOC v. Wyoming*, that this question depends "on consideratons of degree."[96] S. 2568 involves a greater degree of impairment than any of the cited cases. *Hodel* merely involved a requirement that the state regulate surface mining according to a federal minimum standard. *EEOC v.Wyoming* involved application of a federal law regarding mandatory retirement, which left the states free to continue their own retirement policies, if they can demonstrate that age is a "bona fide occupational qualification."[97]

In the one case that sustained the Tenth Amendment challenge, the Court found that application of the Fair Labor Standards Act to the states would have the adverse impact of diverting state funds from other vital state programs to pay workers the federal minimum wage and overtime rates. The inquiry was not so much factual as legal; whether the federal legislation would have a direct and obvious effect on the ability of the states to allocate their resources.[98]

The Court in *EEOC v. Wyoming* also distinguished *National League of Cities* by noting that in *National League of Cities* the Court had found "a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decision making. . . Nothing in this case, however, portends anything like the same wide-ranging and profound threat to the structure of state governance." 99/

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[94] *See*, *e.g.*, *San Antonio Independent School District v. Rodriguez*, 409 U.S. 822 (1973).

[95] *Hodel*, 452 U.S. at 287-288.

[96] 103 S. Ct. at 1062.

[97] *Id.*

[98] 426 U.S. at 851-852.

It is apparent that the effects of S. 2568 exceed those of Hodel and EEOC v. Wyoming in its intrusiveness. It is comparable in scope to National League of Cities; in fact, both the scope and compliance burden are probably much greater. Therefore, S. 2568 would have an even greater effect on the ability of the states to allocate their resources.

The final criterion focuses on whether the federal interest is such that it justifies state submission. Neither EEOC nor Hodel analyzes this test in the majority opinions; in National League of Cities it was implicitly satisfied. The federal government obviously has a great interest in eliminating discrimination. Whether that interest exceeds its interest under the Fair Labor Standards Act in National League of Cities is unclear. But the analysis does not stop with identifying the interest. The means used to accomplish Congress' purpose must also be reasonably related to the interest at stake, considering, perhaps, the degree of actual discrimination involved and the past history of discrimination. On that issue the very limitlessness of S. 2568 together with the absence of evidence of new discrimination make the Bill susceptible to serious challenge.

In its general consideration of S. 2568 Congress might do well to consider the statement of Justice Black in Younger v. Harris:

> [O]ne familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." . . . What the concept does represent is a system . . . in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. 100/

99/ 103 S. Ct. at 1062.

100/ Younger v. Harris, 401 U.S. 37, 44-45 (1970).

The cases discussed here involve the Commerce Clause, but are clearly analogous to Congress' power under the spending power. Indeed the spending power has always been thought to be narrower than, or at most co-existent with, the Commerce Clause.[101] Whether or not S. 2568 finds itself within the outer reaches of Congress' power, the grave policy concerns about such a serious intrusion into state sovereignty, so hastily enacted, ought to be reason for considerable reflection.

V. Recommendations and Amendments

The sponsors of S. 2568 correctly regard this as a time to reconsider, along with other statutes, Title IX. The nation has now had 12 years of experience since the initial enactment of Title IX, aided by considerable interpretative refinements through case law and the regulatory work of the Education Department under both Democratic and Republican administrations.

A. Redraft S. 2568.

This statement of testimony has outlined numerous reasons why broadening Title IX as proposed by S. 2568 is unwise and even dangerous. My first specific recommendation, therefore, is that the Bill as written be withdrawn and re-drafted in a way that responds to the many serious questions it leaves unresolved. That process will also allow a much needed opportunity to consider the need for other refinements and amendments in the law.

Through this means or, as an alternative, by means of specific amendments to S. 2568 as now written, consideration should be given to two particularly needed amendments in the existing law as interpreted by the Supreme Court in the Grove City case. These two proposed areas of amendment follow.

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[101] See L. Tribe, American Constitutional Law (1978); Fullilove v. Klutznich, 448 U.S. 448, 475 (1980).

B. Broaden the Religious Exemption in Title IX.

Earlier portions of this testimony have treated the reasons why Title IX is an especially harmful intrusion into the religious liberty interests of church-related colleges and universities. The exemption now contained in the statute is so narrowly drawn that only those colleges legally "controlled" by a religious organization are entitled to consideration. Religiously oriented institutions of higher education having looser affiliations with a particular church should be fully entitled to this same protection, as should schools with other established educational missions having an explicit religious foundation.

Both the need for a broader religious exemption and the kind of exemption that might be considered are illustrated by the case history of a problem that arose in 1978 between Brigham Young University and the Justice Department.

After investigating an individual complaint, the Justice Department publicly announced its intention to bring suit against the university for violating the sex discrimination provisions of the Fair Housing Act. The university required single students in off-campus apartments to live in sex-segregated apartment buildings, a practice which on its face violated federal law. The Justice Department told the university it had no intention of forcing single students of the opposite sex to share bedrooms or apartments. However, the university's president was not comforted by this assurance, because he saw no legal distinction that would permit a landlord to discriminate on the basis of sex in assigning students to a particular apartment, but prohibited such discrimination in assigning students to a building or one of its wings. The university claimed exemption from the law on First Amendment religious liberty grounds.

Editorials in national newspapers and a vocal public outcry supported the university's position. Said the Los Angeles Times, "The threatened suit appears an abrasive, meddlesome intervention in a situation where the discrimination alleged is more theoretical than real, and where the risk of governmental intrusion in the area of religious freedom is more real than theoretical."

The Justice Department ultimately entered into a settlement agreement with the university, which allowed sex-segregated housing by individual building for single students because of the substantial religious values the department came to recognize. Significantly, the formal agreement expressly applied also "to other educational institutions which, on the basis of religious or moral principle, provide for the sexual separation of their single students in housing."

Title IX, of course, does not recognize "religious or moral principle" as a basis for legitimate distinctions based on gender, unless the college is controlled by a church. The statute could, and should, recognize the same broader religious liberty interest as the Justice Department recognized, once it looked seriously at the impact of a law having purposes and characteristics very similar to Title IX.

If there were to be serious interest in this proposal on the part of Congress, AAPICU and other organizations representing the interests of church-related colleges (and perhaps church-related elementary and secondary schools) would be pleased to be of assistance in considering specific language.

C. Amend the Definition of "Recipient" to Exclude Colleges Receiving No Direct Federal Assistance and Whose Students Receive No "Campus-Based" Benefits.

In the Grove City case, the Supreme Court concluded as a matter of statutory interpretation that federal assistance to students triggers the application of Title IX, even when a college receives no direct federal aid. The statute itself prohibits sex discrimination "under any education program or activity receiving Federal financial assistance." [102]

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[102] 20 U.S.C. § 1682 (emphasis added).

The Supreme Court had the difficult task of deciding key issues under Title IX in the face of ambiguous statutory language, sketchy legislative history, and conflicting judicial and administrative signals. The impact of the Court's holding that students receiving federal grants triggers Title IX coverage was moderated for schools like Grove City College by the Court's determination that statutory coverage must be limited to the school's financial aids program. The majority's resolution of the two issues of "recipient" and "program specificity" could be viewed as a fair result — something of a compromise — in the unique case of a private school which receives no other federal aid. If S. 2568 is enacted as proposed, however, the "compromise" will end. Hence the need to consider the unique problem of the college that has contact with federal funding only through student aid.

What makes the resolution of the student aid question so difficult is that aid to students is in a hybrid catagory. Direct grants to a school (even if channelled first through a state agency) clearly trigger coverage as federal assistance to the school. On the other hand, welfare and other general assistance benefits to individuals do not presently trigger coverage [103] even when used so as to benefit an entity such as a school. Student aid lies somewhere in between these two typical types of federal aid. Students are obviously the primary intended beneficiaries of student aid. It is generally accepted that by educating more of its citizens, the country as a whole is benefitted. In addition, educated individuals are more likely to have higher incomes — possibly repaying with interest the nation's investment in student aid through higher tax revenues, and being less likely to be future welfare burdens. Students are not encouraged to achieve higher levels of education simply to keep the schools solvent. At the same time, of course, schools do benefit from aid to students. Moreover, student aid is earmarked to be used only in connection with education.

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[103] *See* Section II.B., *supra*.

The earlier reference to problems relating to the First Amendment's Establishment Clause [104] suggests two helpful perspectives on this problem. First, the Supreme Court has long distinguished between "direct" and "indirect" aid to religious schools in considering alleged violations of church/state separation. "Indirect" in this sense has usually meant that a specific benefit earmarked for educational purposes went to a student's family rather than to the school he or she attended. Benefits of this indirect type are the only ones to have withstood Establishment Clause challenges. These cases do make clear that the direct-indirect distinction is both meaningful and workable.

Second, for reasons explained previously, [105] the "recipient" status of church-related colleges whose students receive federal assistance may itself be a violation of the Establishment Clause. When considering the applicable constitutional tests, one finds that a critical issue is whether the funds will be spent for a secular purpose. In the context of student aid, the answer to that question depends on who is spending the money. When a student receives a federal grant or loan, the student may spend the money for a variety of education-related expenses, from food and lodging to tuition. Costs other than tuition are frequently high enough in relation to grant amounts to consume all of the student's federal funds. Such costs may well be incurred off campus. It would not be appropriate in such a circumstance to evaluate the secular purpose or source of funds for that student's payment of tuition to a church-related college, because the constitutional issue is whether the school uses governmental funds for non-secular purposes. The entanglements of accounting and metaphysics in this situation seem a bit silly, because a moment's reflection about the problem makes it clear that the student is both the receiver and the expender of the federal money. In addition, of course, there is the risk that an Establishment Clause violation is actually involved in the notion that student aid makes a recipient of a church-related college. The obvious way to remove this risk is to clarify the law so that it regards the student as the final recipient.

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[104] *See* Section II.E., *supra*.

[105] *Id*.

Another helpful approach to the student aid question is found in the framework established by Congress under Title VI. The Supreme Court evidently ignored this guidance in its resolution of the student aid question in Grove City. Since Title IX's legislative history is virtually silent on the student aid question, congressional intent under Title VI as a directly analogous statute may be appropriately relied upon. 105a/

Congress made absolutely clear in the enactment of Title VI that "ultimate beneficiaries" of federal assistance were not covered by Title VI. Senator Humphrey stated that "Title VI will not authorize imposition of any requirements on the ultimate beneficiaries of . . . welfare payments," and "Title VI would not authorize the withholding of any of these direct payments on the ground that the recipient engages in racial discrimination in connection with his business or other activities." 106/ Attorney General Robert Kennedy explained this limitation in connection with the overall scheme of Title VI: "title VI is limited in application to instances of discrimination against the beneficiaries of federal assistance programs." 107/ This statutory scheme seems to have particular application in the case of student aid: the civil rights statutes are meant to insure that the intended beneficiaries are not discriminated against, but beneficiaries are free to choose to attend the school of their choice. 108/

105a/ See n.6, supra.

106/ 110 Cong. Rec. 6545 (1964). This understanding of Congress' intention is reflected in current regulations. See text accompanying nn. 25-27, supra.

107/ 110 Cong. Rec. 10076 (1964) (letter to Senator Cooper) (emphasis added).

108/ See Comment, Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof", 78 Mich. L. Rev. 608, 613-17 (1980).

Not only does the legislative history indicate that Congress did not intend an ultimate beneficiary to be subject to Title VI's requirements, but also it is clear that the primary beneficiary was not to trigger Title VI coverage for another person or entity with whom the beneficiary might have dealings (and who thus would "benefit" from the federal assistance). The original legislation would have broadly covered "direct or indirect financial assistance." 109/ After holding hearings which considered the scope of this coverage of "indirect" assistance, 110/ the "indirect" application of Title VI was removed and replaced with the narrower "program or activity receiving federal financial assistance." 111/ Senator Humphrey further clarified that "[i]t is irrelevant, to the purpose of these acts, what the recipient does with the money he receives. His employees, the customers of his business, or other persons with whom he deals, are in no sense participants in or beneficiaries of these Federal programs." 112/ For the same reasons, it should not matter that a school benefits from a student beneficiary of federal aid.

Central to these limitations intended by the 88th Congress is an implicit concern regarding the unfairness of harming a student on federal aid in order to coerce the school. The beneficiary of the aid should be the one protected, to insure that he or she is not denied the benefits of the federal assistance as a result of discrimination. Closely related to this point, and another strong indicator that student aid should not trigger coverage of a private school, was Congress' strong concern that federal assistance only be cut off in the particular program or activity where discrimination was

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109/ H.R. 7152, 88th Cong., 1st Sess., 109 Cong. Rec. 11252 (1963).

110/ See Civil Rights: Hearing on Miscellaneous Proposals Regarding the Civil Rights Of Persons Within the Jurisdiction of the United States Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 659 (1963).

111/ H.R. 7152, 88th Cong., 1st Sess. (Comm. Print, Oct. 2, 1963).

112/ 110 Cong. Rec. 6545 (1964).

found.[113] Yet, if student aid is the only source of coverage, the only available sanction is to terminate aid to all students, even where discrimination is limited to a particular part of the school.

The Supreme Court in Grove City, while apparently disregarding the evidence of the approach intended by Congress as set forth above, stated that "[t]he drafters of Title VI envisioned that the receipt of student aid funds would trigger coverage."[114] As its support for this statement, the Court cited a floor statement of Senator McClellan.[115] That the Court would cite this as support for its statement is at best disappointing. Senator McClellan's view of Title VI was that it was "clearly unconstitutional."[116] Senator McClellan felt Title VI might "destroy the vast system and network of programs and activities by which the Federal Government is providing essential financial aid and assistance to State and local government."[117] First, rather than support the proposition that Congress anticipated student aid would be covered, Senator McClellan's remarks indicate that Congress was not totally sure what would be covered.[118] Second, in accordance with the Senator's concerns that all grants-in-aid programs would be covered under Title VI, he summarized all federal grants-in-aid programs existing at that time in order to show "what these Federal aid programs mean to the people of this Nation."[119] It was this list the Supreme Court in Grove City cited to show an intention that student aid be covered. Finally, as further evidence that this list is hardly evidence of congressional intent on the issue of student aid, Senator McClellan's list included several types of general assistance welfare benefits, [120] which Congress clearly did not intend to be covered. [121]

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[113] See Section II.C., supra.

[114] 104 S.Ct. at 1218.

[115] Id. at n.15.

[116] 110 Cong. Rec. 13378 (1964).

[117] Id.

[118] See id. at 13382.

[119] Id. at 13385, 13387.

The available legislative history under Title VI supports the view that student aid should not trigger Title IX regulations. This conclusion also corresponds to the sensible approach to Title VI coverage as originally intended by Congress. It is therefore proposed that S. 2568 be amended to remove from the definition of "recipients" those educational institutions which receive no direct federal aid and whose students receive no "campus-based" student aid. All other student aid programs are "campus-based," meaning that the educational institution involved receives the federal funds itself, has some discretion in making student awards, or is in some other way involved in more than a nominal and indirect way. This proposal might more clearly establish that the student aid is "indirect" if the Education Department were to establish local service centers at which students could make applications for federal assistance to be used at an institution that merely certifies such requirements as enrollment and satisfactory progress.

One of the advantages of this proposal is that it uses the "recipient" definition to allow for the special and limited circumstance of independent colleges receiving no direct aid. Thus, no exception is made to whatever Congress chooses to do with the problem of program specificity — which was, after all, the issue from the Grove City case that led to the introduction of S. 2568.

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[120] Id. at 13388-89.

[121] For example, Senator Kuchel stated that "[n]othing in Title VI would authorize cancellation of Federal checks for social security or veterans' pensions or agricultural price supports because the State in which recipients live discriminates in the administration of federally supported programs. Yet some who seek to mislead the public have said there is." Id. at 6563.

ENROLLMENT OF AAPICU MEMBER INSTITUTIONS

Abilene Christian University	Texas	4518
Academy of the New Church	Pennsylvania	159
American Baptist Theological Sem	Tennessee	177
Anderson College	South Carolina	1048
Andrews University	Michigan	2851
Anna Maria College	Massachusetts	1655
Averett College	Virginia	916
Azusa Pacific University	California	2467
Baker University	Kansas	839
Baptist College at Charleston	South Carolina	2170
Baylor University	Texas	10473
Becker Junior College	Massachusetts	516
Belhaven College	Mississippi	938
Benjamin Franklin University	D.C.	408
Berea College	Kentucky	1532
Berry College	Georgia	1499
Bethany Nazarene College	Oklahoma	1400
Bethel College	Kansas	661
Biola University	California	3096
Birmingham-Southern College	Alabama	1553
Bridgewater College	Virginia	894
Brigham Young Univ. - Hawaii	Hawaii	1607
Brigham Young University	Utah	29695
Buena Vista College	Iowa	1403
CBN University	Virginia	350
California Baptist College	California	660
Calvin College	Michigan	3807
Campbell University	North Carolina	3052
Capitol Institute of Technology	Maryland	821
Carroll College	Wisconsin	1380
Catawba College	North Carolina	987
Central New England College	Massachusetts	306
Chowan College	North Carolina	1087
College of Insurance	New York	1622
College of the Southwest	New Mexico	204
Columbia Bible College	South Carolina	877
Concordia Teachers College	Nebraska	1062
Cumberland College	Kentucky	1747
Dallas Baptist College	Texas	1337
Divine Word College	Iowa	99
Dordt College	Iowa	1077
Dr. Martin Luther College	Minnesota	725
Dropsie University	Pennsylvania	42
Eastern Nazarene College	Massachusetts	841
Eckerd College	Florida	1051
Emory and Henry College	Virginia	769
Eureka College	Illinois	537

ENROLLMENT OF AAPICU MEMBER INSTITUTIONS

Flagler College	Florida	981
Friends University	Kansas	813
Furman University	South Carolina	3105
Georgetown College	Kentucky	1211
Grace College of the Bible	Nebraska	312
Grand Canyon College	Arizona	1257
Greensboro College	North Carolina	585
Grove City College	Pennsylvania	2200
Hanover College	Indiana	994
Hardin-Simmons University	Texas	1948
Hebrew Union College	Ohio	145
Heidelberg College	Ohio	840
Hillsdale College	Michigan	1044
Houston Baptist University	Texas	2688
Howard Payne University	Texas	1123
Illinois Benedictine College	Illinois	2362
Indiana Institute of Technology	Indiana	557
International College	California	696
International Fine Arts College	Florida	267
Jamestown College	North Dakota	616
Johnson and Wales College	Rhode Island	4695
Judson College	Illinois	414
Kansas-Newman College	Kansas	759
King College	Tennessee	429
Lenoir-Rhyne College	North Carolina	1382
Liberty Baptist College	Virginia	3386
Limestone College	South Carolina	1536
Loma Linda University	California	5157
Louisburg College	North Carolina	717
Louisiana College	Louisiana	1049
Loyola College	Maryland	6182
Malone College	Ohio	872
Manhattan College	New York	4841
Maria Regina College	New York	508
McKendree College	Illinois	750
McPherson College	Kansas	496
Mercer University	Georgia	2950
Meredith College	North Carolina	1615
Mid-America Nazarene College	Kansas	1218
Midway College	Kentucky	349
Milwaukee School of Engineering	Wisconsin	2536
Mississippi College	Mississippi	2775
Missouri Valley College	Missouri	480
Mount Saint Mary's College	Maryland	1696
Mount Vernon Nazarene College	Ohio	1027
National College	South Dakota	3026
National University	California	6824

ENROLLMENT OF AAPICU MEMBER INSTITUTIONS

Nichols College	Massachusetts	992
North Carolina Wesleyan College	North Carolina	932
Northrop University	California	1445
Northwest Nazarene College	Idaho	1221
Northwestern College	Iowa	891
Northwestern College	Wisconsin	269
Northwood Institute	Michigan	2119
Oakland City College	Indiana	562
Oakwood College	Alabama	1418
Ohio Northern University	Ohio	2625
Oklahoma Baptist University	Oklahoma	1416
Oklahoma Christian College	Oklahoma	1614
Oklahoma City University	Oklahoma	3158
Olivet Nazarene College	Illinois	1907
Oral Roberts University	Oklahoma	4024
Our Lady of the Lake University	Texas	1577
Pacific States University	California	800
Pacific Union College	California	1592
Palm Beach Atlantic College	Florida	656
Park College	Missouri	3179
Parks College	Colorado	892
Parks College of St Louis Univ.	Illinois	1029
Patten College	California	143
Peace College	North Carolina	454
Pepperdine University	California	6499
Point Loma Nazarene College	California	1870
Principia College	Illinois	788
Ricks College	Idaho	6539
Robert Morris College	Pennsylvania	5689
Rockford College	Illinois	1469
Roosevelt University	Illinois	6685
Rose-Hulman Institute of Tech.	Indiana	1322
Saint Augustine's College	North Carolina	1581
Saint Francis College	Pennsylvania	1565
Saint John's University	Minnesota	2028
Saint Joseph's College	Indiana	963
Saint Mary's College	Minnesota	1404
Saint Mary's College of Calif.	California	2956
Saint Mary's University	Texas	3311
Salve Regina - Newport College	Rhode Island	1961
Samford University	Alabama	4161
School of the Ozarks	Missouri	1293
Sierra Nevada College	Nevada	212
Simpson College	California	306
Southern Methodist University	Texas	9156
Southern Missionary College	Tennessee	1801
Southwestern Adventist College	Texas	712

ENROLLMENT OF AAPICU MEMBER INSTITUTIONS

Southwestern College	Oklahoma	51
Sterling College	Kansas	394
Taylor University	Indiana	1460
Tiffin University	Ohio	510
Trevecca Nazarene College	Tennessee	972
Trinity Christian College	Illinois	440
Trinity College	Illinois	556
Truett-Mcconnell College	Georgia	852
Union College	Nebraska	1024
Union University	Tennessee	1374
University of Dallas	Texas	2684
University of Mary Hardin-Baylor	Texas	1170
University of Richmond	Virginia	4411
Valparaiso University	Indiana	4251
Villanova University	Pennsylvania	11716
Warren Wilson College	North Carolina	535
Wayland Baptist University	Texas	1469
Wentworth Institute of Tech.	Massachusetts	3737
Westminster College	Utah	1233
Westminster Theological Seminary	Pennsylvania	422
Wheaton College	Illinois	2490
Whitworth College	Washington	1802
William Jewell College	Missouri	1569
Wingate College	North Carolina	1481
York College of Pennsylvania	Pennsylvania	4364

The **Chairman**. Thank you, President Hafen. We will put your complete statement in the record.

Mr. Epstein.

STATEMENT OF RICHARD L. EPSTEIN, SENIOR VICE PRESIDENT, AMERICAN HOSPITAL ASSOCIATION, ACCOMPANIED BY STUART M. GERSON, COUNSEL TO AMERICAN HOSPITAL ASSOCIATION

Mr. **Epstein**. Thank you, Senator Hatch.

The American Hospital Association appreciates very much this opportunity to respond to the questions and address the concerns that have arisen out of the drafting of S. 2568.

I would like to point out in connection with what has been testified to earlier, our own position with respect to those issues as well as some others.

Two of the things that we have heard prominently are the fact that there is a great deal of ambiguity, lack of clarity, an opportunity for misunderstanding and perhaps overreaching in the present draft of the bill.

By the way, I am not sure I agree that this broad scope that S. 2568 has was actually intended by the drafters. As a matter of fact, I think that's the problem that the committee and the Senate need to address.

Our concerns are also three in number. And they are similar in the sense that they arise out of, again I would say, the lack of clarity and what may or may not be intended, the broad reach, for example, with respect to the word "recipient." We focused on it, I would suggest, because it's central to the projected legislative repeal of *Grove City* and its program-specific limitation. And it is the focus, as we can see here this afternoon, of expressions of opposition and concern. And we would urge that that and other language be clarified.

There are a number of ways of doing it. In recommending it, there is no particular format that we urge for achieving it.

Second is the matter of enforcement. If we look at the enforcement provisions, I think we find the irony that where in the case of hospitals, the termination of funding, which would be the sanction imposed for an alleged violation, would be expanded from the program as to which discrimination has been found to any particular assistance which supports the area of discrimination. It's the same side of that coin of spreading the effect.

If this broad recipient language is retained, and even, I would suggest, if it is clarified, this committee should undertake at least the definitional limitation of the term "support" which defines the scope of the funding.

We have here a sanction in which there is supported the spread over what may not be intended as the field of those who would be affected. The irony of it is that the persons who would be most directly affected by a suspension of funds as a sanction would be the patients of hospitals, which it is really the purpose of the Congress to protect.

Third is the matter of the meaning of Federal financial assistance. This is a prominent part of the Civil Rights Act itself, and it remains as well in the proposed amendments. We don't really have a definition of Federal financial assistance, and I would note that the sponsors of the bill, in focusing on the issue of direct and indirect receipt, have overlooked the definition of what it is that is being received. And I would suggest that it is inappropriate to assume that grant receipt equals assistance.

There are four basic reasons why Federal financial assistance is not appropriate in this setting. The provider is not the beneficiary; there is in fact, no benefit to the provider. The insurance contract exemption which would normally rule out assistance as part of coverage is not applicable here because medicare and medicaid are not treated or viewed as an insurance contract. And last, in the case of medicaid, the State is the recipient.

Mr. Chairman, I would like to emphasize the distinction between what is our concerns about how this bill is drafted, so that it not be construed as opposition to the effort to do some repair work where it's needed.

Thank you.

[The prepared statement of Mr. Epstein and responses to questions submitted by Senator Hatch follow:]

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TESTIMONY OF THE AMERICAN HOSPITAL ASSOCIATION BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES ON THE CIVIL RIGHTS ACT OF 1984 (S. 2568)

June 26, 1984

Mr. Chairman and Members of the Committee, I am Richard L. Epstein, Senior Vice President of the American Hospital Association (AHA). The AHA, which represents over 6,100 member hospitals and health care institutions, as well as more than 38,000 personal members, is pleased to have this opportunity to present its views to the Senate Committee on Labor and Human Resources concerning S. 2568, the "Civil Rights Act of 1984."

INTRODUCTION

S. 2568 was introduced by its sponsors with the stated, limited intention of overturning the Supreme Court's recent decision in Grove City College v. Bell, 104 S. Ct. 1211 (1984), in which the Court held the Title IX of the Education Amendments of 1972, and its enforcement mechanisms, were program-specific in their coverage. Because three other statutes (section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964), contain language virtually identical to that of Title IX considered by the Court in Grove City, S. 2568, and its counterpart H.R. 5490, would amend all four statutes by replacing their references to "programs or activities receiving" Federal financial assistance with the term "recipient." That term is then very broadly defined and the enforcement scope of the subject statutes is also expanded.

Hospitals are concerned that in focusing on the legislative repeal of Grove City, the drafters of the bill have enmeshed themselves in the confusing concept of what constitutes a covered entity. While the definitional problems inherent in resolving that issue are severe, and require the amendment of the bill, the essential difficulties of the bill can only be resolved if Congress clarifies the matter of what constitutes Federal financial assistance.

Additionally, hospitals are concerned with the extended enforcement thrust of S.2568, not because civil rights laws should not be enforced, but because, especially as applied to hospitals, the extended termination of funds beyond the discriminating program or activity threatens to contradict the fundamental purposes of both the civil rights laws and medical treatment itself. We think it both anomalous and unfair to extend penalties in such a way that their real target becomes the patient who is the true recipient and beneficiary of federal assistance. This consideration affects not only the matter of penalties, but again relates to who should be considered a "recipient" and what should be considered "Federal financial assistance."

AHA both understands and supports the laudable intention of the sponsors of the bill to insure that the Federal civil rights laws have appropriately broad coverage and effect. Indeed, AHA and its membership wholeheartedly endorse the purposes and objectives of these laws to eradicate discrimination on the basis of race, creed, color, sex, national origin, age or handicap. Therefore, in addressing S. 2568, hospitals are not suggesting that the program-specific provision of the subject statutes should not be altered or expanded, or that hospitals should be excluded from appropriate requirements for non-discrimination.

Instead, AHA is desirous of assisting this Committee and the Congress in developing practicable and effective legislation to achieve the stated goal of the bill while avoiding unintended pitfalls that could lead to confusion, excessive regulation and wasteful litigation.

1. The Definition of "Recipient"

As I have noted, the essential feature of the bill's attempt to declare that the coverage of the subject civil rights statutes is to be institution-wide is the deletion of the "program or activity" limitation and the substitution of the term "recipient." The difficulty here is that the proposed term allows such broad and uncertain interpretation, that the bill's likely result could be far more that the mere reversal of the Grove City case. This result could be the expansion of enforcement activities into vast and uncharted areas, without benefit of thoughtful deliberation experiance or guidance. Considering the statements of a number of the bill's proponents, we believe that such an effect is unintended.

Although the definition of "recipient" is claimed to be derived from existing regulatory definitions under the subject statutes, it is in fact a great deal broader than any of them. First, under current regulations, "recipients" are covered only in their funded "programs and activities," and not in their entireties, as is now proposed. Second, indirect coverage is radically expanded by the addition of a clause, not found in present regulations, including entities "which receiv[e] support from the extension of federal financial assistance to any of [their] subunits." Third, the current regulatory exemption for "ultimate beneficiaries" has been deleted. Moreover, the phrase "receives support" is not defined in the bill and does not exist in present regulations.

The primary effect of this proposed alteration is clear: the Grove City decision would be overturned. However, the bill would do a great deal more in its troublesome and unintended extension of legal and regulatory strictures throughout entire institutions if any one of its activities or elements was the direct or indirect recipient of federal aid.

It has been suggested that the bill could be read to encompass coverage of all campuses of the many multi-location state universities, provided that federal educational grants were made to the students on any one campus, or even in any one department on that campus. Many analogies can be made from this hypothesis.

For example, is regulation intended to extend to non-educational or commercial functions carried on by or under the authority of an educational insitiution? Of more pertinence to the membership of AHA, would a university hospital be subject to automatic coverage merely be virtue of the receipt by undergraduates of "Pell Grants?" What of a hospital or, for that matter, any type of research or teaching facility, only affiliated contractually (or even less formally) with a university?

In similar fashion, it has been suggested that receipt of Federal financial assistance by any state or municipal entity could trigger statutory coverage of virtually the entire state or municipal government and all those functions operated, directed, and even regulated by it. Many hospitals are legal entities of state or local governments, and so this issue is of great concern to hospitals. However, it goes much further. S. 2568 can be read to extend coverage, and all of the administrative responsibilities and regulatory burdens that go with it, to myriad governmental departments, collectively and individually, if any of them, be it a fire department, a police department, even a library, receives a federal grant. Arguably, regulatory responsibilities could even be asserted as to the purely private entities some of which are hospitals, which contract with governments.

2. AHA's Legislative Suggestions

Of course, to suggest the possibility of unbounded statutory and regulatory sweep is to imply that reasonable legislators will try to avoid such difficulties. And given the statements of limited and focused congressional intendment made to date, and the very consistent testimony of variety of federal, state, institutional and private witnesses at hearings such as this one AHA is confident that reasonable legislative result can, and will, be reached. We have several suggestions which we believe can help achieve that end.

a. Clarifying the term "recipient"

Because the term "recipient" is central to the projected legislative repeal of Grove City and its program-specific limitation, and is the focus of expressions of opposition and concern, AHA suggests clarfying or limiting its definition. There are a number of ways in which this reasonably can be done, and in recommending this clarification AHA does not urge any particular format for achieving it.

However, AHA believes that both clarity and reasonable limitation might be achieved if several of the terms that S. 2568 intertwines with "recipient" would be defined. For example, we find no definition of the "subunit" that could require coverage of the encompassing "entity," which itself is not described in any detail. The bill does tell us that the larger "entity" will be deemed to be the "recipient" if it "receives support from the extension of Federal financial assistance to any of its subunits." However, this "support" also is not defined or limited. The inclusion of language in the bill, or at least appropriate statements of intention in the legislative history, might do much to make the bill effective and to assist in the realization of the important goal of securing civil rights to all.

b. Tailoring enforcement terms

Under S. 2568, the current public and private mechanisms of enforcement of the civil rights laws would be maintained, but the remedy -- the termination of funding -- would be expanded from the program as to which discrimination has been found, to any "particular assistance which supports" the area of discrimination. If the broad "recipient" language is retained, or even if it is clarified, this Committe should undertake at least the definitional limitation of the term "supports" which defines the scope of the funding stoppage.

The reason for this clarification or limitation is manifest, especially when consideration is given to the applicability of the bill to hospitals. Because the remedy to be imposed upon a finding of discrimination is the termination of funds, the persons most directly affected by such action would be the hospital's patients. As we have earlier mentioned, it seems to us to be contradictory of Congressional purpose to create such adverse impact in the name of assuring civil rights.

In addition, this Committee might devote some attention to the issue of what burden of proof is required to establish a violation. There can be little question that the adoption of an "effects" test would increase both litigation and confusion, and in the case of hospitals, could lead to the improper interposition of government in medical-treatment decisions. Instead, enforcement should be directed in favor of identifiable victims of intentional discrimination whose situations can, and should, be vigorously remedied. See Firefighters Local Union No. 1784 v. Stotts, 52 U.S.L.W. 4767 (U.S. June 12, 1984).

c. Defining Federal financial assistance

S. 2568 does not define "Federal financial assistance," nor does any of the four statutes that the bill would amend. Thus, if the bill were to be enacted as it is now drawn, not only would we be left with an overly-broad category of affected "recipients," both direct and indirect, but that which such entities receive -- Federal financial assitance -- would also be subject to an expansive reading. In a very real way, each of these terms injudiciously might be held to broaden the other and, consequently, to lead to the regulatory inclusion of entities far removed from present congressional intention.

In view of the Grove City case itself, it is not surprising that the hastily-drawn S. 2568 does not address the issue of Federal financial assistance. After all, in that case, there was no issue that the educational insititution was a beneficiary of Basic Educational Opportunity Grants because the legislative history of the act enabling those grants makes it clear that Congress intended just that. However, the reach of S. 2568 extends far beyond the realm of "Pell Grants" to entities touched by Federal programs concerning which Congress has said nothing about who should be deemed a recipient of Federal financial assitance. Moreover, both law and logic suggest that such entities as, for example, grocery stores that accept food stamps, or hospitals, suppliers or pharmacies that receive payment through Medicare or Medicaid programs, should not be held to have received Federal financial assistance.

As we have noted, none of the laws subject to S. 2568 defines Federal financial assistance. Furthermore, there are almost no court holdings which provide a reasoned analysis of the question, except for, the case of Cook v. Budget Rent-A-Car Corp., 502 F. Supp. 494 (S.D.N.Y. 1980) which does contain a thoughtful and comprehensive discussion of the issue.

In Cook, the court observed that the word "assistance" suggests a governmental "subsidy" rather than a contract for the sale or purchase by the government of goods or services at "fair market value for services, the party who obtains such payment is not within the "plain meaning" of the law "a recipient of federal financial assitance." Id.

Viewed in these terms, a supermarket that obtains payment through the food stamp program, a landlord who ultimately receives governmentally-subsidized rents, or a medical-care provider whose renumeration is tendered through Medicare or Medicaid, should not be classified as having received Federal financial assistance. Undoubtedly, the persons who receive the benefits of such programs -- the consumer, the tenant or the patient -- are obtaining Federal assistance, but the ultimate recipients of the money are not.

The federal programs most affecting hospitals are Medicare and Medicaid. Both of these represent no more than governmental purchases for services on behalf of program beneficiaries. Medicare (enacted in 1965 as Title XVIII of the Social Security Act, 42, U.S.C. sec. 1395, et seq.) is an exclusively Federal program providing hospital and supplementary medical benefits to the aged and disabled. Medicaid (also enacted in 1965 as Title XIX of the Social Security Act, 42 U.S.C. sec. 1396, et seq.) is a medical-assistance program operated by both federal and state governments for impoverished persons who are aged, blind or disabled, or for members of families with dependent children.

Under appropriate determinations and contracts, Medicare pays no more than a predetermined price for each category of case. Medicaid pays no more than an amount theoretically targeted to compensate an efficient hospital. It is fair to say that such payments certainly are not designed to exceed actual hospital costs and, typically, they are significantly less. Thus, to the extent that "assistance" flows in any direction, it flows from hospitals to the government or to Medicare and Medicaid beneficiaries. */

Obviously, hospitals are the entities with which our Association is most familiar and which, therefore, provide us with the clearest support for our suggested view of what should define Federal financial assistance. However, hospitals are far from the only providers of services potentially so affected. As we have mentioned, owners and managers of rental residential properties, owners and operators of supermarkets and grocery stores, and

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*/ One court has held that Medicare and Medicaid constitute Federal financial assitance within the meaning of section 504 of the Rehabilitation Act. United States v. Baylor University Medical Center, 564 F. Supp. 1495 (N.D. Tex. 1983). That case is currently on appeal to the United States Court of Appeals for the Fifth Circuit which has entered an opinion staying the effect of the District Court's holding. In so doing, the Court of Appeals noted that it had "been cited no definitive ruling the would gude us in this care." United States v. Baylor University Medical Center, 711 F.2d 38, 40 (5th Cir. 1983). As AHA has discussed herein, the most logical view is that while patients are clearly beneficiaries of Federal aid, hospitals which are selling their services are not.

drug store owners and pharmacists are also similarly situated. If the governmentally-based payments that any of them receive are deemed to constitute Federal financial assistance, they will be subject to costly and disruptive administrative burdens, site visits, compliance reviews and investigations and, often, litigation. Especially in a struggling, recovering economy, these are things to be avoided, and through appropriate definitional revision of S. 2568, this committee can help to achieve that end.*/

CONCLUSION

The matter of greatest importance to AHA is the provision by its member hospitals of needed medical services to the communities they serve. Clearly, the containment of the cost of such services is an issue of current and vital concern to the Congress and to all Americans as well as to hospitals. We think it incontrovertible that the passage and implementation of even the most well-intended civil rights legislation should not impede the delivery or receipt of services designed to assure maintenance or restoration of a most fundamental human need -- health. For these reasons, AHA has urged a number of ways in which S. 2568 can be made less intrusive and less confusing, while achieving its stated intention of reversing the program-specific limitation of the Grove City case as applied to the four subject civil rights statutes.

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*/Irrespective of whether Medicare and Medicaid constitute Federal financial assistance to hospitals, it is clear that hospitals are subject to a multiplicity of laws that prohibit discrimination as to the fundamental relationships between hospitals and their employees and between hospitals and their patients. For example, the employees of a typical hospital are protected against racial discrimination by Title VII of the Civil Rights Act of 1964 and by 42 U.S.C. S 1981, the post-Civil War act. These employees are

AHA's suggestions center upon the revision of three definitional clusters within the bill: 1) the question of what constitutes a "recipient" and how far the definition should be stretched; 2) the breadth of "support" entities subject to enforcement sanctions; and 3) the creation of a reasonable definition of "Federal financial assistance" that would allow for the effective provision of needed public services. AHA believes that these tasks can be accomplished and the purposes of Congress achieved, and we are eager to assist in providing whatever ongoing assistance the Committee would desire.

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similarly protected by Title VII against sex, religion and national origin discrimination, and by the Age Discrimination in Employment Act of 1967 as to age discrimination. Handicapped employees also are protected by section 503 of the Rehabilitation Act. Hospital patients are protected to the extent that any program or activity encompassing them is the recipient of direct federal funding. They are also protected by 42 U.S.C. S. 1981 and S. 1983 against racial discrimination as to the conditions of their treatment and accomodations. It should also be noted that all hospital patients are ill or handicapped. The mission of hospitals is to treat such persons and discrimination on those bases would be contradictory of what hospitals are committed to.

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June 29, 1984

The Honorable Orrin Hatch
Senate Committee on Labor
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Washington, D.C.

Dear Senator Hatch:

On behalf of the American Hospital Association (AHA), we again thank you for the opportunity of presenting testimony on June 26, 1984, before the Senate Committee on Labor and Human Resources concerning the Civil Rights Act of 1984 (S. 2568). At this time, we are pleased to answer the additional written questions that have been submitted to AHA through the Committee's staff.

QUESTION: How many members are in the AHA?

ANSWER: The AHA represents more than 6,100 member hospitals and health care institutions, as well as more than 38,000 personal members.

QUESTION: How many members of AHA receive Medicare or Medicaid?

ANSWER: The institutions who comprise AHA's membership do not directly "receive" Medicare and Medicaid. However, approximately 6,500 registered hospitals and approximately 5,800 community hospitals obtain reimbursement through either or both of those programs. These hospitals treat more than 10 million Medicare/Medicaid patients annually.

QUESTION: If the Bill passes in its present form, what do you perceive the negative impact, if any, to be for your members?

ANSWER: S. 2568, as currently drawn, is so broad in its terms that if it were to be enacted as is, both regulators and courts could very well be engaged in activities far beyond the scope of those experienced before the Supreme Court's recent decision in Grove City College v. Bell. This is not to say that the impact necessarily should be viewed as negative as far as hospitals are concerned, but it could be very significant.

The term "recipient," which would replace the term "program or activity" in the four civil rights statutes can be held to apply to virtually any parent unit or subunit of any entity that receives Federal financial assistance. Thus, for example, if one student in an undergraduate department of a university receives Federal aid administered by that university, and that university also operates, or even contracts with, a hospital, that hospital could be subjected to the administrative and other responsibilities imposed by the laws covered by S. 2568.

Similarly, a hospital operated by, or contracting with, a state or municipality could be similarly subjected to these burdens if some remotely related governmental entity were held affected. Moreover, all departments, divisions and units of any hospital will be subject to these statutes if any hospital segment is held to be a recipient of Federal financial assistance.

In pointing out these potential effects, AHA is not objecting to the application of the civil rights laws to hospitals. AHA both deplores unlawful discrimination and supports its members compliance with the requirements of law. The adverse impact of the terms of S. 2568 would result from the increased regulatory and administrative burden that would be needlessly duplicative of the requirements of the many existing civil rights laws that apply to AHA and its members.

Where the impact of the bill would be most negative, is in the new scope of sanctions, but that impact would be less upon hospitals than upon their patients. The bill would eliminate "pinpoint" relief and the substitute sanctions that would require the termination of Federal funding to any entity that "supports" the one found to have discriminated.

As applied to hospitals, this provision could result in the termination of funding as to which patients are the intended beneficiaries. As AHA pointed out in its testimony, it would be a cruel anomaly if, in the name of civil rights, the most fundamental health interests of our aged and least affluent citizens were adversely impacted upon.

QUESTION: If a hospital is a "teaching hospital" - that is one which provides clinical experience as part of an organized curriculum to train doctors and nurses, will that bring the medical schools and nursing schools automatically under the coverage of Title IX?

ANSWER: As we have previously stated, the bill is so broad that this result is possible. AHA believes that the Congress ought carefully to consider whether an effect this broad is intended by it.

QUESTION: It is my understanding that there are quite a number of private, for profit hospitals - in fact some chains of such hospitals which are on the board of the stock exchanges. Empty beds cannot help but be a concern of these institutions. A person unable to pay for services, who also happens to be handicapped, minority, and/or a woman, is denied admission simply for monetary reasons, they could file a "right of private" action suit, could they not?

ANSWER: AHA would not expect that, if passed, the bill would affect the availability of hospital services. In any event, the laws subject to S. 2568 do not speak to private actions based on economic status.

These laws do allow private suits based on allegations of race, sex, national origin, age and handicap discrimination, and while it is impossible to predict whether the bill would spawn more lawsuits, it is clear that such suits could affect entities far beyond the coverage of pre-Grove City law, despite the sponsor's statements of more limited intention.

AHA and its members are strongly committed to civil rights and, accordingly, do not oppose the idea that hospitals should be subject to the reasonable requirements of the law. Hospitals are concerned that under the very broad scope of enforcement now provided for in the bill, they and their patients might be very adversely affected because of the conduct of distantly related entities over whom hospitals have no control.

QUESTION: Do you have any idea how much it now costs members of your association to comply with Federal regulations - on a per bed, or any other basis? Have you made any assessment of what it would cost to comply if, as some witnesses have suggested, you might have to satisfy the regulatory requirements of nearly every Federal agency that dispenses funds for human services?

ANSWER: Compliance costs vary depending upon the situations of various institutions, and cannot be estimated in detail. However, three recent studies of the costs resulting from hospital regulation are appended hereto and provide useful insights on the issue.

S. 2568, as drafted, is of very broad scope. It is impossible to know exactly how expansively it would be interpreted, but it is very clear that administrative and compliance expenses would be significantly greater if the conditions suggested in the question were to come about.

The most unfortunate thing about this would be the unncessary duplication of efforts among such Federal agencies enforcing overlapping legislative and executive requirements. As AHA noted in its testimony, its members are already subject to the requirements of numerous, important civil rights laws which are comprehensive in scope.

QUESTION: Do you think S. 2568 will cause an increase in the cost of malpractice insurance for both hospitals and practitioners?

ANSWER: The bill should not affect the nature of medical services and the skills and procedures through which they are provided. Malpractice insurance issues therefore would not be raised.

QUESTION: In your opinion, do Medicare and Medicaid constitute Federal financial assistance for purposes of the Civil Rights Act? [Similarly] Would you make clear on what basis you believe that Medicare and Medicaid benefits are not Federal financial assistance.

ANSWER: As AHA has testified, Medicare and Medicaid should not be held to constitute Federal financial assistance to hospitals or other medical-care providers. As the court held in the well-reasoned case of Cook v. Budget Rent-A-Car Corp., 502 F. Supp. 494 (S.D.N.Y. 1980), the word "assistance" suggests a government "subsidy" rather than a contract for the sale or purchase of services at their true cost.

In these terms, hospitals do not receive Federal financial assistance through these programs because Medicare and Medicaid represent no more than the purchase by the government of services on behalf of program beneficiaries. It is those persons who are receiving the Federal assistance, not the hospitals who are the ultimate place of the payment transaction.

Additionally, Medicare and Medicaid should be regarded as programs of insurance, which by definition lie outside the scope of financial assistance. Moreover, because Medicare and Medicaid reimbursement levels are typically less than actual hospital costs, it is fair to say that hospitals provide assistance rather than receiving it.

QUESTION: If Medicare or Medicaid were deemed to constitute Federal financial assistance, what would you estimate the cost of compliance with the Civil Rights Act of 1984 to be to your membership? Would this cost ultimately be passed through to health care consumers? Will hospitals ultimately refuse to see Medicare or Medicaid patients if this Bill is enacted?

ANSWER: If this bill were enacted, and if Medicare and Medicaid were deemed to be Federal financial assistance, the potentiality of additional cost to hospitals would result from their being subject to administrative and regulatory requirements of a duplicative nature that would be more extensive than any anticipated or experienced in the pre-*Grove City* era. It is not possible to gauge this expense at present.

Especially in view of the new prospective payment system for reimbursement, the bill should have no effect upon costs incurred by patients subject to these programs. Nor could charges be passed along to such patients or the government. Further, AHA would not anticipate hospitals' refusing to treat these patients.

QUESTION: With the additional regulatory burden necessarily imposed by S. 2568 on hospitals, what impact do you see on either the quality of care or the cost of it?

ANSWER: This question is much like the previous one. AHA does not anticipate any direct effect upon the quality of care delivered by its members. It is, however, greatly concerned by the possibility that burdensome and duplicative legal responsibilities will divert resources and personnel away from areas in which they might better be employed to provide medical-care services.

QUESTION: Isn't the concern about definitions like "recipient" or "supporting entity," for example, really just nit-picking?

ANSWER: No. S. 2568, as drafted, would have a pervasive impact on the Nation's institutions and governmental units. The risks and burdens of living with undefined or extremely broad terms of such a statute are self-evident.

We believe that due consideration ought to be given to these definitions by Congress, especially where, as we have shown in regard to hospitals, the persons most adversely affected by the bill would be the patients that Congress is otherwise committed to serve.

QUESTION: Are you concerned that some people might charge that you are using an apparent concern for the regulatory burden to mask a real concern about compliance with the civil rights requirements.

ANSWER: Any such charge would be without foundation. AHA is strongly committed to the eradiction of discrimination and, as noted, its members are presently subject to a full array of federal and state laws that guarantee that mandate that there will be no unlawful discrimination as to the two basic sets of relationships that hospitals have: with their patients and with their employees.

What legitimately concerns hospitals is the possibility that S. 2568 will force a diversion of their resources away from areas where they might best be used -- that is, in supplying health services. And in view of the likely duplication of present legal requirements, such a diversion would be most unfortunate. Finally, hospitals are concerned that, if it is passed as drafted, S. 2568 might lead to the impairment of funding to patients, the true beneficiaries of Federal assistance. Such a result would be both unfair and contradictory to the protection of civil rights.

AHA believes that the "program specific" limitation of *Grove City* can be eliminated without imposing the dangers and uncertainties inherent in S. 2568 as drafted. In urging full and careful consideration by the Congress, AHA continues to stand ready to provide whatever assistance might be requested of it.

Yours very truly,

Richard L. Epstein

Richard L. Epstein
Senior Vice President

The CHAIRMAN. Thank you, Mr. Epstein.

I appreciate both of you trying to finish within the 5-minute time allotted.

Dr. Hafen, could you share with me the attitudes of your own institution—in fact, I will ask both of you this question—share with the committee the attitudes of both of your institutions and that of other institutions, if you can, with regard to your policies. If S. 2568 is enacted into law without amendment, would you anticipate a change in policy, for example, relating to the admission of students receiving Federal scholarship assistance, or otherwise?

Mr. HAFEN. Two of the members of our association have already made public announcements to the effect that if the bill is enacted into law, they will no longer admit students who are receiving Federal grants.

We did a little telephone poll of some of our members and learned that about half of them had not made up their minds what to do. They were going to wait and see. I think a large number will continue to admit students. But there are some who will not.

The CHAIRMAN. Mr. Epstein, do you see any change in your organization's policy?

Mr. EPSTEIN. I don't know if I could forecast what the result would be, except to remind us all that a number of our constituents are teaching institutions or hospitals which are a part of medical centers which are affiliated with teaching institutions.

The CHAIRMAN. OK. What are the policies of each of your institutions toward the admission of racial minorities and women? Have any of your institutions, for instance, ever been accused of discriminatory policies, Mr. Hafen?

Mr. HAFEN. Not that I am aware of. And as I think people generally know—I hope they do—in the *Hillsdale* and *Grove City* cases—and both of those schools are members of our association—there was no allegation or finding of discrimination in those cases. And I know of no others among our schools.

The CHAIRMAN. If each of your institutions abides by a policy of nondiscrimination toward protected categories of individuals, what precisely is it that concerns you about the matter of title IX coverage? Is it simply a matter of having to file a few Federal forms from time to time? And don't the objectives of title IX actually outweigh that relatively minor inconvenience?

Mr. HAFEN. Well, there is a substantial compliance burden, especially when you extend coverage campuswide. When a couple of students on a GI bill can result in that kind of coverage, the burden is substantial in relationship to the number of people actually affected by the aid.

The larger problem for the private colleges and universities in our association is the impact especially of title IX on their overall educational philosophy, because we're not talking, once you begin discussing what a school can do in its educational programs, it's very unclear when discrimination in some illegal sense would be involved, because the proponents of the bill have in their mind a cectain idea about educational philosophy and how that should relate to the role of the sexes and the ideas about family life, marriage, matters of sexual morality, whether inquiries about abortion and sexual attitudes and practices are permitted.

All of those things are very sensitive personal matters, and especially at church-related matters. They are matters that go to the heart of why parents send their children to those schools. And if a private school is unable to maintain an atmosphere in which those issues are important and could be examined as they have been traditionally in private institutions, then there is not much reason to have private institutions anymore. They are so much more expensive. The reason they have been maintained is because there are people who want a different kind of atmosphere. And if that atmosphere is to become the same as the public institutions, then the whole reasons for their existence is seriously undermined.

The CHAIRMAN. Mr. Epstein, it's my understanding that there are quite a number of private or profit hospitals —in fact, some chains of such hospitals which are on the board of the stock exchange. Now, empty beds can't help but be a concern of these institutions. The person, for instance, unable to pay for services, who also happens to be handicapped, a minority and/or a woman is denied admission simply for monetary reasons, it seems to me they could file a "right of private action suit" against the hospitals, could they not, under this bill, should it be enacted, or even without this bill?

Mr. EPSTEIN. They have remedies. There are a number of laws and regulations now in effect which would provide a remedy to those who claim that they have been denied care as a member of a protected class. It includes the Civil Rights Act of 1867. It includes the obligations that go with Hill-Burton funding and the requirement for rendering charity care and community service on a nondiscriminatory basis, as well as local and State laws dealing with discrimination.

So I would suggest that it is not necessary to have that kind of remedy again overlaid in this kind of legislation. It is there. It has been used when there has been a perceived violation.

The CHAIRMAN. Dr. Hafen, just one other question and then my time is up. How would you contrast the attitude, say, of the institutions you represent with those of the larger, say, Ivy League institutions, larger private schools? For example, can we expect to hear much concern expressed by these institutions along the lines that you have testified to?

Mr. HAFEN. Probably not, Senator Hatch, because most of those schools receive large amounts of Federal aid, and it would not be possible for them to take the position we're taking; namely, that institutions that receive no aid other than student aid should be exempt from this law.

Senator, if I could, I would like to just add one postscript to something that Professor Fried said. I would like to have the committee consider his question: why not keep him from discriminating about who he can invite home to dinner?

You're talking about private activity, and that's the reason that it seems like an absurd question. It isn't a very absurd question when you consider the fact that who he invites home to dinner is not much more private than questions that have traditionally arisen in private colleges, universities, churches, private hospitals, private organizations of many kinds.

The difficulty that we're having with this bill is that people are reluctant to say what's really on their minds, and that is, they would like to regulate all private activity, and rather than trying to draw a rational line that people can live with between how far the Federal law should go and beyond which it should not go, we're using the kind of capricious accidental question of how far can you trace a Federal dollar to transferees, assignees, and so on? And that will extend very broad coverage, but it's not likely to be very rational coverage, and certainly not based on very thoughtful policy considerations about where the line ought to be between private conduct that is beyond regulation such as inviting people to dinner and the whole sphere that should be subject to regulation.

The **Chairman**. It's not only private activity, but all State and local governmental activity as well, would be covered under this bill, if you just simply read the language that's there.

Senator Nickles.

Senator **Nickles**. Thank you, Mr. Chairman.

Mr. Hafen, I appreciate your last comment. I think that was well put. So your primary objection is the intrusion of the Federal Government into the running of your institutions.

Mr. **Hafen**. Well, I guess that would be one way of saying it. As I indicated, private institutions have traditionally and historically proceeded from different premises than those that govern State institutions, because State institutions represent the State. They simply do not have the freedoms that other institutions have. For instance, the first amendment right of free speech doesn't apply in private institutions there. You talk about civil rights, there's a big one. But the Constitution doesn't provide for it, because the Constitution only governs State action. And that kind of traditional boundary between public and private sectors is what we're talking about here.

Senator **Nickles**. Do you not want to be brought under the law so you can discriminate?

Mr. **Hafen**. I thank you for serving up that question. I would like to respond just as directly. The reason that colleges and universities in the private sector fear this law is that it threatens the very essence of their educational philosophy. At most of the institutions in our association, just for an example, the relationship between religious faith and learning is central to what goes on on the campus. In counseling sessions, for instance, between faculty members at my college, and students, traditionally the students want to be able to talk about such things as how career choices may affect marriage plans and that sort of thing. Under the regulations that now exist under title IX, that's not supposed to take place. There are to be no distinctions drawn between men and women. But if the students themselves sense those distinctions and they want to relate their ideas about their roles in life and their attitudes about marriage and careers, if they want to relate all of that to their educational plans, if they're not free to do that in conversations with their faculty members at a private religious school, then who are they going to talk to about it?

It is an important issue as young people develop their own sense of meaning and purpose in their lives. And one of the reasons we've had so many different kinds of private educational institutions at the college and university levels is so that people can choose among many paths to discovery to personal meaning. That's how we have achieved pluralism in this country, that people can choose different attitudes and atmospheres and learning environments. And the effect of this bill is to create a kind of monolithic environment where every school is a mirror of the public school.

Senator NICKLES. I have got some questions from some of the institutions in our State when I asked them for their opinion on this legislation. One was—and I will just ask you the question in their language—do you believe that passage of this act would require racial quotas for Christian schools?

Mr. HAFEN. I don.t know the answer to that.

Senator NICKLES. Do you think it would cause a problem if you had a private school in a predominantly ethnic area, for instance a black, Indian, or Hispanic school?

Mr. HAFEN. That's not an area on which I have done research, so I will give you an off-the-top-of-the-head response. It does seem to me that those schools that have grown up in the private sector, that serve particular ethnic groups and so on, would have some trouble under an effects tests. If they're not allowed to discriminate in favor of the members of a certain minority group, I think there would be difficulty.

Senator NICKLES. You have submitted to the committee a very lengthy statement, and I haven't had a chance to review it as of yet. I see some problems, as far as some of the definitions, which is common throughout the objections.

Also, you mentioned a couple of questions. I previously said something about the term "recipient." Do you believe that it would include schools which enroll students receiving general welfare assistance?

Mr. HAFEN. As the bill presently reads, there is no question about that. And if that were to occur, that would establish a basis for jurisdiction that did not exist before *Grove City*.

Senator NICKLES. Now, this is somewhat dovetailed into Senator Hatch's question, and maybe to Mr. Fried's comments earlier. What if your institution is broadened? How does that really handicap your institution as far as performing well?

Or, Mr. Epstein, you could cover this as well, why would a private college care, assuming that neither institution has, quote "discriminated"? I think you answered that it's your policy not to discriminate?

Mr. HAFEN. Senator Nickles, if I may, just in the interest of time, I would refer you to pages 23 through 33 of my written statement, in which I try to answer that question. It's a very important question, and it deserves a thoughtful answer. And I have tried to give it one.

The people of this country must feel that private education offers them something, because they're willing to pay tuition three and four times what they find in the public sector. And if there isn't any distinction to be found, then why do they do it?

There has been a distinction, and it's an important one, and it's worth defending. It's been around a long time now. I think the answer will be there in the pages I have referred to.

Senator NICKLES. Mr. Epstein, do you have any comments on that?

Mr. EPSTEIN. I can't speak for universities and schools, but I would like to address your question.

Senator NICKLES. Would you pull the microphone down?

Mr. EPSTEIN. I would like to address your question, because implicit in all of this I think it's very easy for us to overlook something that's very important. It seems ironic to me that we have devoted so much of our national resources here and the Federal Government and its seat to reviewing and trying to take down the regulatory apparatus to some more manageable level, that we have done it with respect to procedures at OMB in examining the costs of implementing regulations, that we have done it with the Grace Commission, and that we devote so much attention to our concern about the web of regulation.

It's ironic that in that setting that there would be a proposal where it has been earnestly suggested from a number of sources that there is an overlap, where there is redundancy, where there is put into place the tentacles that reach out.

I don't know whether it's intended or unintended. I would prefer to think that it was a mistake and not intended, and just a matter of draftsmanship. Professor Fried feels otherwise.

But nevertheless, the result is that we're looking here at a proposal, no matter how well-intentioned, which will result in more regulation not simply with an incentive for lawyers, but an incentive for a variety of persons who will feel a perceived need to complain, have duplicative apparatus in order to carry that claim.

And that's what makes the darned thing so expensive that over in another setting we are so concerned about. And I think that irony presents the committee here an opportunity to eliminate it before we add to it.

Now, that would apply not just to universities, it would apply to hospitals, it would apply to anybody who comes under the jurisdiction of this bill.

Senator NICKLES. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Well, thank you, Senator Nickles.

Thank both of you.

President Hafen.

Mr. HAFEN. One last quick footnote. As I listened to the discussion during the previous panel of witnesses about pre-*Grove City* and post-*Grove City*, I would like to observe my own surprise and concern that so many people have uncritically and inaccurately assumed that this bill does nothing more than restore the law to a kind of pre-*Grove City* situation.

I would urge that those who genuinely want to know the answer to that question review the legislative history on title VI, because what we're now talking about—that is, whether the spending power should be the basis for extending jurisdiction beyond particular programs or activities beyond those who receive money, to transferees of money, all those questions were debated at great length when title VI was adopted and Congress consciously after a lengthy consideration concluded that that was too broad.

That is the pre-*Grove City* law, and that's the fundamental concept of this bill. It seems to me that's worth reviewing for those who wonder if the bill would simply return us to the status quo, because in looking at that legislative history, I think it clearly would not just return us to the status quo.

The CHAIRMAN. Well, thank you, President Hafen.

Thank you, Mr. Epstein. We appreciate your taking the time to be with us.

In order to accommodate Senator Kennedy, who is in the armed services hearings also and who cannot be here at this time, we are going to zigzag the panels a little bit and we're going to call to the witness chair Benjamin Hooks, the executive director of the National Association for the Advancement of Colored People, and chairman of the Leadership Conference on Civil Rights; and also Mr. Drew Days of the Yale Law School, who is former Assistant Attorney General of the United States in charge of the Civil Rights Division.

We are happy to welcome both of you to the committee.

We are happy to welcome you, Ben, to the committee again.

And, Drew, I have to admit I used to listen to you a great deal when you used to testify for the Justice Department. And it's awfully nice to have you back in town again and being able to testify before this committee. And welcome to the Labor and Human Resources Committee.

We will start with you.

STATEMENT OF BENJAMIN L. HOOKS, CHAIRMAN, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, AND EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Mr. HOOKS. Mr. Chairman and members of the committee, my name is Benjamin L. Hooks, and I am the executive director of the National Association for the Advancement of Colored People.

The CHAIRMAN. Dr. Hooks, could you hold just a second?

I have to leave. Senator Nickles is going to conduct. I just don't want you to feel—I will read what you have to say and will pay attention to it.

And you also, Mr. Days. I apologize for having to leave, but I believe Senator Nickles will take charge of the hearing, and then Senator Grassley, when he gets here, will be happy to take over then.

Thank you.

Mr. HOOKS. Mr. Chairman, members of the committee, my name is Benjamin Hooks, and I am the executive director of the National Association for the Advancement of Colored People and chairman of the Leadership Conference on Civil Rights, which is a coalition of 165 organizations which include civil rights, fraternal, religious, education, women's, and labor groups.

We at the Civil Rights Conference enthusiastically support Senate bill S. 2568, the Civil Rights Act of 1984. We believe it is a carefully tailored response to the Supreme Court decision in *Grove City College* v. *Bell*, which limited the reach of title IX.

It restores the broad coverages Congress intended for title IX, and protects title VI of the 1964 Civil Rights Act, which is the benchmark legislation on which title IX, section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 are derivative. These statutes are linked by common language and history.

I am mindful of the details of this legislation and the need for it and that they have been discussed at great length during extensive House hearings and at three prior Senate hearings. Therefore, I will try to clarify in the brief time I have what I think the bill does and what it does not do.

S. 2568 and its House counterpart embodies and reinforces our Nation's commitment to equal justice and equal opportunity. The overriding national policy would be a mere sham if we were to commit Federal funds which are contributed by all to aid and abet discrimination against some because of the color of their skin, their sex, their age, or their handicap.

It makes crystal clear that the four cross-cutting civil rights statutes prohibiting discrimination on the basis of race, sex, disability, and age apply to an agency, institution, or entity. Recipients of Federal funds may not maintain pockets of discrimination while benefiting from the national purse. By providing for broad coverage of recipients, the bill will restore the law as it was prior to *Grove City* and as it was administered and enforced by both Republican and Democratic administrations.

It does not, in our opinion, establish any new rights, create any new remedies, or include any new recipients. And therefore, Mr. Chairman, the question becomes quite simple: why is there such disagreement? The disagreement is because Mr. Reynolds, for instance, of the Attorney General's office argues that there should be a programmatic reading of title IX and that *Grove City* did not represent a change in law. With this, we disagree.

We maintain that this legislation is needed.

I see the light is on, so I will rush through the rest of this and simply end by saying that, in our opinion—pardon me, what was the meaning of that light? That leaves me 1 minute?

Senator NICKLES [presiding]. You're still on good time. The yellow light means you have 1 minute left.

Mr. HOOKS. All right, then. Thank you very much. I got a little confused about the light, Senator.

It is our judgment that this bill is needed, that it will correct what happened in the *Grove City* case, that it is not a broad, new brushstroke. And I confess as I sit here and as I was reading through some of the testimony involving the Civil Rights Act of 1964, that we have a strange sense of going back through history, and I can hear people now saying that the 1964 Civil Rights Act was a monstrosity, that the Federal Government cut off aid here, there, and yonder, that we were buying into a bag that we knew nothing of. And I think I hear some of those same things being said today, and I simply dispute that that would happen.

I think that there are no broad and sweeping changes, but simply brings the intent of this legislation—this legislation, rather, back to where it was pre-*Grove City*.

Thank you, Mr. Chairman.

And thank you, Senator Kennedy, for this time.

[The prepared statement of Mr. Hooks follows:]

Leadership Conference on Civil Rights

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TESTIMONY
of

BENJAMIN L. HOOKS

CHAIRMAN

LEADERSHIP CONFERENCE ON CIVIL RIGHTS

on S2568
THE CIVIL RIGHTS ACT OF 1984

June 26, 1984

"Equality In a Free, Plural, Democratic Society"

Mr. Chairman and members of the committee, I am Benjamin L. Hooks, Executive Director of the National Association for the Advancement of Colored People and chairman of the Leadership Conference on Civil Rights, a coalition of 165 organizations which include civil rights, fraternal, religious, education, women's, labor groups.

The Leadership conference on Civil Rights enthusiastically supports S2568, the Civil Rights Act of 1984. S2568 is a carefully tailored response to the Supreme Court's decision in Grove City College v. Bell which limited the reach of Title IX of the Education Amendments of 1972 prohibiting sex discrimination by recipients of federal financial assistance. It restores the broad coverage Congress intended for Title IX. It also protects Title VI of the 1964 Civil Rights Act which is the benchmark legislation on which Title IX, Sec 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975 are derivative. These statutes are linked by common language and history.

Mr. Chairman, I am mindful that the details of this legislation and the need for it have been discussed at great length during extensive House hearings and at three prior Senate hearings; therefore, I shall in the time alloted attempt to clarify some misinformation that is adrift about the legislation and to reassure those who wonder whether it will lead to unintended, harmful results or greater federal control.

WHAT S. 2568 DOES

S. 2568, and its House counterpart H.R. 5490, embodies and reinforces our Nation's commitment to equal justice and equal opportunity. This overriding national policy would be a mere sham if we were to permit federal funds which are contributed by all to aid and abet discrimination against some because of the color of their skin, their sex, their age, or their handicap.

S 2568 makes crystal clear that the four cross-cutting civil rights statutes prohibiting discrimination on the basis of race, sex, disability and age apply to an entire agency, institution or entity. Recipients of federal funds may not maintain pockets of discrimination while benefiting from the national purse. By providing for broad coverage of recipients, the bill will restore the law as it was prior to Grove City and as it was administered and enforced by Republican and Democratic Administrations.

S. 2568 further retains the same fund cut-off sanction which is required by the four amended statutes. The scope of termination authority is much narrower than the scope of coverage. The "pin-pointing" test of "particular federal assistance which supports" in S. 2568 is drawn from existing case law, Board of Public Instruction of Taylor County v. Finch.

S. 2568 will provide unambiguous statutory construction for the federal agencies which administer the four amended civil rights laws and thereby prevent inconsistent and arbitrary enforcement of the law. Already since the Supreme Court's decision, we have seen the Department of Education close, narrow, suspend or otherwise limit Title IX compliance reviews and investigations, frequently without factual inquiry into existing federal funding patterns. School districts and higher education institutions have begun raising Grove City as a jurisdictional bar to investigations by the Office for Civil Rights.

WHAT S. 2568 DOES NOT DO

S. 2568 does not establish any new rights, create any new remedies or include any new recipients than the four amended statues defined prior to Grove City. This legislation does not expand these nondiscrimination statues as they existed prior to that decision. How then can one fathom Assistant Attorney General Reynold's and other opponents' claims that S. 2568 is an expansion, some say "radical new interpretation," of federal authority to prohibit discrimination?

The answer Mr. Chairman is quite simple. There is a fundamental disagreement between opponents and proponents of S. 2568 as to what the law was prior to Grove City. Mr. Reynolds argues that the Supreme Court's "programmatic" reading of Title IX represented no change in the law. Of course, if one thought the pre-Grove City law was narrowly applied to specifically funded programs, then the institution-wide approach is new. But this is the only Administration and the only Assistant Attorney General for Civil Rights in 20 years that has thought the law was "programmatic." And I might point out that Mr. Reynolds does not believe in the "programmatic" interpretation himself when it comes to suing hospitals for the records of Baby Jane Doe in order to investigate under the authority of Section 504. In United States v. University Hospital, State University of New York, Stony Brook, Section 504 coverage was assumed on the basis of the Hospital's receipt of Medicaid and Medicare. It mattered not whether the infant intensive care unit was a direct recipient of federal financial assistance.

Mr. Reynolds further attempts to mislead people when he says that every court of appeals except the Third Circuit in the Grove City case itself has construed Title IX to be programmatic in coverage. The facts are that the bulk of the circuit courts that have addressed this issue have taken an institution-wide approach. In cases dealing with both Title VI and Title IX, the second, third, fourth, fifth and ninth circuits have decided in favor of broad coverage.[1] Only the first and the sixth circuits have taken the programmatic approach.[2] It is further disingenuous to cite Taylor County for the proposition that Title VI is "program specific" when that case had to do with termination, i.e. "pinpointing," and not with coverage.

1/ North Haven Board of Education v. Hufstedler, 629 F. 2nd 773 (2nd Circuit 1980);Grove City College v. Bell, 687 F 2nd 684 (3rd Circuit 1983);Haffer v. Temple University 688 F. 2nd 14 (3rd Circuit 1982), Bob Jones University v. Johnson aff'd 529 F. 2nd 514 (4th Circuit 1975), United States v. Jefferson County Board of Education, 372 F. 2nd 836 (5th Circuit 1966), aff'd en banc, 380 F. 2nd 385, cert. denied, 389 U. S. 840; Bossier Parish School Board v. Lemon, 370 F. 2nd 847 (5th Circuit), cert. denied, 388 U. S. 911 (1967); United States v. El Camino Community College District, 454 F. Supp. 825, aff'd 600 F. 2nd 1258 (9th Cir. 1979)

2/ Rice v. President and Fellows of Harvard College, 663 F. 2nd 336 (1st Circuit 1981), cert. denied, 456 U.S. 928 (1982); Hillside College v. Department of Health, Education and Welfare, 696 F. 2nd 418 (6th Circuit 1982).

Passage of S. 2568 will not expand the coverage of Federal civil rights laws to institutions and units of state and local government not now covered. Private institutions, like Grove City College and Hillsdale College, as employers of 15 or more employees, have been covered with respect to their employment practices under Title VII of the Civil Rights Act of 1964. And indeed they have been covered under Title VI for 20 years, for to my knowledge those colleges never refused to sign the Title VI Assurance of Compliance. So they themselves have been covered with no claims of federal instrusion.

State and local governments have been covered by 24 separate nondiscrimination provisions of funding statutes, including Revenue Sharing which reach virtually every unit of local government. So these governmental entities are already covered by the four statutes to be amended by S. 2568 and by 20 others.

Similarly specious is the argument advanced that federal funds to a state will automatically bring within the reach of Title IV, Section 504 and the Age Discrimination Act all activities within a state. Cities and counties are separately incorporated and politically independent entities of the state. As I am sure you know, Mr. Chairman, the Governor of Utah does not run Salt Lake City.

S. 2568 does not create overlapping jurisdiction or recipients by different federal agencies. There are already in place interagency agreements and an Executive Order designed to coordinate civil rights enforcement within the Executive Branch and to avoid overlapping jurisdiction. Mr. Reynolds himself is charged with carrying out the coordination responsibilities assigned to the Attorney General under that Executive Order. There is also a widely accepted practice of interagency referrals of complaints, specifically to prevent the scary spectacle Mr. Reynolds raised in his testimony about the Environmental Protection Agency investigating a complaint of discrimination in country road maintenance. If any person is in doubt about where to file a complaint, he or she can always send it to the U.S. Commission on Civil Rights which will refer it to the proper agency.

Finally, I would like to address a concern that you have raised, Mr. Chairman, about the definition of federal financial assistance. Specifically you have raised the question of whether tax expenditures, such as deductions of state income and sales tax deductions on federal income taxes, do not constitute federal financial assistance to schools and other public activities and thereby somehow vastly expand the reach of federal law. Let me allay your concern. First, federal financial assistance has always been considered direct federal outlays, not tax expenditures in the form of lost federal revenue due to income tax deductions. The definition of federal financial assistance is contained in each agency's regulations under Title VI, Title IX, Section 504 and the Age Discrimination Act. That definition of federal financial assistance remains the same. It is not affected in any way by S. 2568

Second, the public and private entities that would benefit by your theory of indirect federal aid are already covered if they receive direct federal aid.

I sincerely trust, Mr. Chairman, that these hearings have given you and other members of the Committee a full understanding of the issues involved in S. 2568. I certainly hope that you appreciate the vital importance of these issues to America's racial minorities, our women and elderly and our handicapped citizens.

THANK YOU.

Senator NICKLES. Thank you very much, Mr. Hooks.

Mr. Days.

STATEMENT OF DREW S. DAYS III, PROFESSOR, YALE LAW SCHOOL

Mr. DAYS. Thank you, Senator Nickles.

I have a prepared testimony which I will submit for the record, if that's agreeable.

Senator NICKLES. Thank you.

Mr. DAYS. I will try to summarize the major points.

First of all, I want to indicate for the record that the testimony that I am submitting is endorsed by Justice Department officials from several prior administrations, including Benjamin Civiletti, who was Attorney General in the Carter administration; Elliot Richardson, Attorney General in 1973; John Shenefield, Associate Attorney General, 1979 to 1981; Harold Tyler, Deputy Attorney General from 1975 to 1977; J. Stanley Pottinger, who was my predecessor at the Civil Rights Division from 1973 to 1977; and Stephen Pollak, who was also Assistant Attorney General in charge of the Civil Rights Division from 1968 to 1969.

I think it's important for the record that these other former officials have endorsed my testimony, because the burden of my statement is essentially that what S. 2568 does is legislate into Federal law prior administrative practice; that is, administrative practice prior to the *Grove City College* decision. And I think it's an improvement in the law, the type of thing that the Congress should do in order to ensure, as Benjamin Hooks just said, that Federal funds that come from everybody's tax dollars are not used in ways that discriminate against some people based on race, national origin, sex, disability, or age.

I heard some of the earlier testimony today, and I heard Professor Fried's testimony. One thing we agree upon is having institutionwide coverage under this legislation. After that, as I told him after he left the witness table, we part company. And I think the difference that we have is not merely that he teaches at Harvard and I teach at Yale, but I am here instead to describe what my experience was in actually enforcing these statutes and implementing the laws that this Congress passed with respect to nondiscrimination in programs funded by Federal dollars.

Now, he suggested, and I think many other persons concerned about this legislation that are critical of this legislation, that some of the language might be subject to interpretation that would be inconsistent with what the proponents of the legislation say they intend to do with the congressional intent, once this legislation becomes law.

But I think one can do that with any statute that the Congress enacts, and it's a risk that I think you always run in passing laws. But I also think that good lawyers, whether they are bringing antitrust cases or tax cases or civil rights cases, are chastened by the degree to which Congress has made its will clear, and it can do so in the legislative history in the colloquies, as you well know, and in reports that explain what the Congress is attempting to do or intending to do under this legislation.

And I think even up to this point there has been ample evidence of what the Congress has in mind, and certainly what the proponents have in mind; namely, that there be a restoration of the practice prior to the *Grove City* decision.

I think this legislation does do that. It is consistent with prior administrative practice. Although the language is in some cases different, it in fact adopts language from the case law and from regulations that have been construed and accepted by the courts.

But what it, in effect, does is, as I have said in my testimony, employ a fairly straightforward test; namely, could Congress conceivably have intended that institutions discriminating against persons that Congress intended to protect would be allowed to continue to do so without any consequence being brought to bear for that conduct.

In addition to adopting the administrative practice, and a practice that's been accepted by the courts prior to *Grove City College,* the legislation does not attempt to alter anything else with respect to prior practice or indeed the way in which these statutes have been understood. The pinpointing provision is retained. There is no indication that I can find in the legislation or in the discussion of its objectives to do away with the pinpointing provision. Intent versus effect is not involved here. Professor Fried has suggested that there is an effects test for those statutes, and I would like to think that he is right. But I think there is a bit more ambiguity in that regard in the courts.

But the important point is that issue is not presented by this legislation and does not attempt to resolve it.

One last point—I see the red light is on—has to do with coordination. I was directly involved in attempting to coordinate executive branch enforcement of these very statutes, and while it's a difficult task, I think it's one that can be carried out. The mechanisms are already in place for coordination; for example, between title IX and title VII. The Justice Department is responsible for coordination in some other respects.

So I don't see that this legislation imposes any insurmountable or unnecessary administrative burdens upon those who have to enforce the law. I think that it's a good law. It's very much needed and ought to be enacted.

Thank you very much.

[The prepared statement of Mr. Days follows:]

TESTIMONY OF

PROFESSOR DREW S. DAYS III

YALE LAW SCHOOL

on S. 2568

"THE CIVIL RIGHTS ACT OF 1984"

before

COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

JUNE 26, 1984

This testimony endorsed by:

The Honorable Benjamin R. Civiletti	Attorney General	1979-1981
The Honorable Elliot Richardson	Attorney General	1973
The Honorable John H. Shenefield	Associate Attorney General	1979-1981
The Honorable Harold R. Tyler	Deputy Attorney General	1975-1977
The Honorable J. Stanley Pottinger	Assistant Attorney General for Civil Rights	1973-1977
The Honorable Stephen J. Pollak	Assistant Attorney General for Civil Rights	1968-1969

I want to thank the Committee on Labor and Human Resources for offering me the opportunity to testify today in favor of S. 2568, the "Civil Rights Act of 1984." I think that it is a sound and much-needed legislative proposal to ensure that the four major federal laws prohibiting discrimination by fund recipients, Title VI, Title IX, Section 504 and the Age Discrimination Act, continue to be viable and effective tools in protecting the rights of racial and ethnic minorities, women, the disabled and the elderly.

I speak to you as one with a rather extensive background as a civil rights litigator, both as a staff lawyer at the NAACP Legal Defense and Educational Fund, Inc. and as Assistant Attorney General for Civil Rights in the Carter Administration from early 1977 to the end of 1980. As a law professor for the past three years, my teaching and scholarly pursuits have focused on questions of civil rights and civil liberties.

My personal experiences and my study of the history of congressional efforts to end various forms of discrimination in America since 1964 have led me to conclude that the overall objective was to make certain, in the area of federal funding, that taxpayers' dollars were not used to initiate or perpetuate the very forms of bias and prejudice that other substantive statutes addressed more directly.

Federal funds should not be allowed, under Title VI of the Civil Rights Act of 1964, to go to school districts found by the Justice Department under Title IV to be operating segregated facilities. Educational institutions should not be allowed to discriminate against women employees under Title IX in ways that directly violate Title VII of the Civil Rights Act of 1964.

I am aware that these observations are not original or startling. They go to the very heart of the federal government's duty, as Congress correctly saw it, to prohibit, and to remedy where practiced, both simple-minded and sophisticated techniques for continuing discriminatory practices while "feeding from the public trough." But sometimes truisms bear repeating. Memories tend to grow dim with the passage of time and principles that seemed so clear and right when they were first pronounced often get lost in a flurry of debate over hypothetical horrors that most of my law school colleagues, who thrive on hypotheticals, would find too far-fetched, given past administrative practice, to merit presenting for class discussion. The simple justice of requiring recipients of federal funds to treat all persons fairly should not be lost sight of as the central question.

I cannot stress enough the importance of the four statutes addressed by S. 2568 to the civil rights enforcement effort. In the case of Title VI, hundreds of school districts were effectively desegregated because of vigorous administrative action, either self-initiated, as in the Johnson Administration, or court-directed, as was true in many instances thereafter. And Title IX has forced American education to address directly the often subtle, but deadly, ways in which females have been deprived of an equal opportunity to realize their full potential to learn in the classroom, compete on the athletic field and assume positions of responsibility in the larger society.

The significance of Section 504 deserves special note. Since Title VII of the 1964 Civil Rights Act does not prohibit discrimination in employment on the basis of handicap, the disabled must look principally to Section 504 to obtain any meaningful relief against exclusionary practices in this area. While the Age Discrimination Act has not been the subject yet of much enforcement activity, to my knowledge, there is no reason to believe that its potential impact will not be equally significant, particularly for older Americans. As a general matter, finally, nothing restores the dignity of victims of discrimination, whether they sue themselves or rely upon government representation, more than to know that their hard-earned dollars are no longer being used to support such reprehensible and damaging practices.

Let me turn now to the question of how these statutes have traditionally been enforced. I think my description will serve to reassure you that S. 2568's effect will be to ratify and reauthorize practices of many years standing which the Supreme Court's recent decision in Grove City College v. Bell, 465 U.S._____ , 104 S.Ct. 1211 (1984) curtailed. To take the example of a school district, if federal funds were being provided to support the general educational program or to benefit children in the system in other ways, it was my position as Assistance Attorney General for Civil Rights that the recipient district was covered by Title VI such that racial segregation of children was prohibited throughout the system as a whole. Where there appeared to be a nexus between activity not directly funded and directly funded activity, full coverage also was regarded as consistent with Title VI. Consequently, even though federal funds were designed to benefit children and not to support teachers' salaries, racial discrimination or segregation with respect to teachers was regarded as prohibited activity.

The guiding principle in such instances was simple to identify, it seemed to me: Could Congress conceivably have intended that children who were entitled under the Constitution to attend school in a desegregated system, nevertheless must suffer in silence segregation of teachers so long as the students themselves were not discriminated against directly and no federal funds were supporting the teacher assignment practices? The answer that Congress could not have struck me as both obvious and correct, given the history I mentioned earlier. Similar examples could be cited under Title IX and Section 504. The question in those cases was essentially the same: Was it Congress' intent to allow taxpayers' dollars to go to a recipient who, while committing itself to act nondiscriminatorily, nevertheless, continues to harm the very persons Congress sought to protect in the very ways that Congress sought to prevent?

In other instances, not uncommon, there appeared on the face of things to be only a remote connection, if any, between the target of federal funding and the claimed discrimination. Examples of this would be an effort to link alleged discrimination at one campus of a state university system to federal funding provided to another, separate campus or an assertion that federal funding in one government department ought to be terminated because of alleged discrimination in another, unrelated department. Our response was to decline to take any enforcement action. And in those cases where we, as government officials, and federal funding recipients disagreed over the degree to which there was any nexus between funding and alleged discrimination, the recipients were free to argue their position both in the administrative process and in the courts. This process was dictated by the so-called "pinpoint" provisions of the affected statutes. Under those provisions, the cutoff of federal funds is permitted only in the federally supported program or activity that is actually found to be engaged in prohibited discrimination. Where federal funds went to an institution, such as a school district, as general support for its educational activities, we interpreted the "pinpoint" provision to justify the cutoff of such funds whenever prohibited discrimination was uncovered in any part of its educational operation. Moreover, where a school district received earmarked grants for certain specific programs that it administered, fund cut-off might be appropriate despite the absence of any direct evidence of discrimination in those programs if their operation appeared to be significantly affected by discriminatory practices elsewhere in the school system. As the Fifth Circuit Court of Appeals stated in the often-cited case of Board of Public Instruction of Taylor County Florida v. Finch, 414 F.2d 1068 (1968), construing the pin-point provision of Title VI:

> In finding that a termination of funds under Title IV (sic) of the Civil Rights Act must be made on a program by program basis, we do not

> mean to indicate that a program must be considered in isolation from its context. To say that a program in a school is free from discrimination because everyone in that school is at liberty to partake of its benefits may or may not be a tenable position. Clearly the racial composition of a school's student body, or the racial composition of its faculty may have an effect upon the particular program in question. But this may not always be the case. In deference to this possibility, the administrative agency seeking to cut off funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory.

414 F.2d at 1078-79. It is my understanding that S. 2568, while making certain language changes, contemplates the continuation of the "pinpoint" limitation upon fund cut-offs under the affected statutes and the case law developed in connection with that limitation prior to Grove City College.

Moreover, as Assistant Attorney General for Civil Rights, it was my responsibility to advise Executive Branch agencies of their administrative authority under the relevant statutes and to recommend, from time to time, whether agency enforcement or referral to the Justice Department for litigation would be more effective in carrying out the legislative purpose. In every case where I felt that novel or legally complex coverage issues were raised, it was my recommendation that the matter be referred for litigation in order to insure that subsequent administrative action was guided by the decision of an Article III federal court, rather than that of an administrative law judge.

One such complex question that arose during my tenure was whether Title VI enforcement should be guided by the "effects" test, adopted by the Supreme Court for Title VII employment discrimination litigation in Griggs v. Duke Power Co., 401 U.S. 424 (1971), or the "intent" test which the Court held was applicable to constitutional challenges under the Equal Protection Clause of the Fourteenth Amendment, Washington v. Davis, 426 U.S. 229 (1976).

Because the Court had appeared to take diametrically opposite positions in decisions only four years apart, Lau v. Nichols, 414 U.S. 563 (1974) ("effects" test) and Regents of the University of California v. Bakke, 438 U.S. 265 (1978) ("intent" test), the proper answer was not easy to arrive at then. And I tend to think that the matter is still not free of confusion, despite the Court's attempt last term to resolve it in Guardians Assn. v. Civil Service Commission of City of New York, _____U.S._____, 103 S.Ct. 3221 (1983).

I mention all of this history to make a brief, but I think important, point: S. 2568 does not attempt in any way, insofar as I am aware, to address or attempt to resolve this question of whether the "effects" or "intent" standard is applicable to the relevant statutes.

The approach we followed, one we inherited from our Republican predecessors and they from prior administrations, was dictated first and foremost by common sense. Of course one can read Title VI, Title IX, Section 504 and the Age Discrimination Act, as they presently stand, in a fashion that would support major expansion of federal enforcement authority. It is a risk every Congress faces in enacting laws that must be enforced over time by a series of administrations with differing views in this regard. But the truth is that prior administrations have not abused congressional trust or intent in carrying out enforcement activities under these statutes by expanding unduly their scope or terms.

In fact, it was my experience that Executive Branch agencies worked very hard in the Carter Administration, building on the work of our predecessors, to ensure that the four statutes at issue here were enforced in a sensible, coordinated and consistent fashion. I, for example, served as chairperson, acting for the Attorney General, of the Interagency Coordinating Council under the Rehabilitation Act to prevent federal agencies with lead responsibilities under various provisions of that legislation from making inconsistent or burdensome demands of federal fund recipients. I was also instrumental in developing Executive Order 12250, which expanded the Justice Department's coordinating responsibility for Title VI enforcement to encompass Title IX and Section 504, as well. In my estimation, S. 2568 by establishing identical coverage and enforcement standards for the four affected statutes will, given the already existing coordination mechanisms, contribute to rather than detract from efforts to provide federal fund recipients with a clear, coherent and consistent picture of what type of compliance is required.

Whereas prior administrative enforcement has been characterized by a common-sense approach, the Supreme Court's recent decision in Grove City College is anything by commonsensical. Based upon a tortured reading of legislative history, the Court reaches the conclusion that a recipient can take federal money, provided by way of student financial assistance, use it to support sex discrimination in college activities not directly related to the operation of its financial aid office and not be subject to Title IX, Congress' major effort to rid American education of such practices. It seems to follow, moreover, since Title IX is patterned after Title VI, that the same college could practice racial segregation outside of its financial aid operation and risk no sanctions under that latter statute. The same goes, one would assume, for Section 504, also structured like Title VI, and the Age Discrimination Act. This is a result that flies in the face of the last 20 years of congressional efforts to combat discrimination by those who thrive on federal funds. It is a reading of the law that denigrates the historic work of Emmanuel Cellar and Hubert Humphrey, whose vision in promoting the passage of Title VI pointed the way for later leaders in the Congress to address forcefully the shameful treatment of women, the handicapped and the aged by recipients of federal monies.

But our system of government provides us with a mechanism to set things right again when the Court misreads the legislative intent of the Congress: Congress can amend the law to make its will unmistakable. That is what I understand S. 2568 to be about. It restores to the Executive Branch the power to enforce Title VI, Title IX, Section 504 and the Age Discrimination Act in the responsible, common-sense way that had been the case prior to the Grove City College decision. It makes no further changes in the scope or terms of these statutes. It should be enacted. Its corrective action is critically needed.

Thank you.

Senator NICKLES. Thank you very much, Professor Days. I have just a couple of comments for either or both of our panelists. As I heard both of you make a statement, you claimed that this legislation restores prior *Grove City* statutes and actual practice. Is that correct?

Mr. HOOKS. Yes; that's my belief, yes.

Mr. DAYS. I concur.

Senator NICKLES. Is it your belief then that we wouldn't be seeing an extension? We've heard others say that this would be a broad expansion of Federal power into areas that it has not been before. The farmers, for example, would they be brought under this act?

Mr. DAYS. Well, let me say generally, Senator Nickles, that a lot of the hypotheticals that have been raised in connection with this legislation are indeed just that, because in so many instances recipients of funds under these acts, or affected by these four statutes, receive funding from all kinds of other Federal programs; for example, banks, as Professor Fried mentioned. Banks are covered by, as you well know, a host of Federal regulations and requirements, and therefore there has not been the incentive, indeed if there were the power, to go after banks in connection with whether they were lending to institutions that received Federal funds.

But the short answer is that the courts and administrative agencies have viewed the whole question of pinpointing the program-specific language as being essentially a factual inquiry. One cannot know what a program is in the abstract. It's not like what Justice Stewart said about pornography, "You know it when you see it." It's something that requires a factual inquiry, and I think the interesting thing about the *Grove City* decision is that it's the first time to my knowledge that the Supreme Court has decided what a program was on a bare factual record, where there was no information upon which the Supreme Court could make what I think would have been an intelligent decision about what was the covered program.

In the *Durong* case, having to do with handicapped discrimination, the Supreme Court avoided making that decision because it didn't have the facts. This was true in the *North Haven* case under title IX.

So while I am perfectly willing to try to sort out with you and other members of the Senate how this legislation would work in fact, I want to say in advance that it has been a very detailed factual inquiry that administrative agencies have conducted and the courts have required before there could be any direct enforcement of these provisions.

And I expect that that practice would continue under this statute.

Senator NICKLES. Now do you want to answer my question?

Mr. DAYS. Well, I think farmers would be affected in the same way they've been affected in the past, that there would not be any change in the way that they're treated.

Senator NICKLES. We've heard the example of grocery stores and the fact that they may use food stamps. Do you think, Mr. Hooks, that they would be brought under these acts?

Mr. HOOKS. I don't see how they would be, but if they were—and first I want to say I don't think they would be—but if they were, I don't think that the requirements or the results would be any more than they already are under other kinds of acts that already are on the books, if I have answered your question directly.

Senator NICKLES. All right. However, there is a concern. Many people, mostly Senators and Congressmen, have said, we're trying to restore." However they don't really want to go back into their districts and enter a place in downtown Boston or New York to see a little grocery store and the Federal Government's requirement, "Wait a minute, he only had four employees and they are all black or all white." Then somebody will say "You're discriminating, or you're not in compliance."

Mr. HOOKS. Well, I heard that from other witnesses, and I can only say--I heard, I think, Professor Fried say—the banks would be here if they were aware. I just can't imagine the 6000 banks in America being unaware of anything that might affect them. They holler as loud as anybody. [Laughter.]

Mr. HOOKS. Nor can I imagine, when we talk about the little grocery store, they have one of the most powerful lobbies in the world because they are one of the largest businesses in America, doing multibillion dollars in business, and they have very effective and capable lobbyists here. And I am sure if there were something, you know, confronting them, they would be here.

I just fail—in other words, what I seem to hear from some people is that we ought to be careful about laws because they're difficult to understand, obey, and enforce. And it looks like to me I hear a cry, "Let's not have any laws, because it might mean a little bit more than we think it does." And I just don't think that that kind of negative approach is justified.

I heard the other discussion about it, and I am sorry I am going a little beyond your question, but I have to simply say that there may be, there may always be, the remote possibility that a law passed to do one thing may be a little bit different than we expect. I don't see that as a real potential in this case, or as a probability.

But I am hastening to add that even if that probability that I don't think will happen should come to pass, that it will not be so onerous as to negate the good effect of what the Senate passage of this bill would be.

Senator NICKLES. I want to make sure that I understand your answer. The first time I heard your reply I thought you said that you didn't see any expansion into those areas.

Mr. HOOKS. I do not. I still do not.

Senator NICKLES. Fine. I thought you also qualified it

Mr. HOOKS. But I am going one step further.

Senator Nickles.

Mr. HOOKS. Even if you have—I mean when you start dealing with hypotheticals and potentialities and possibilities, when you start to thinking about what a law can be made to mean—and that seems to be what we're talking about—I simply wanted to extend my remark one step further. I have answered in very unequivocal words, I do not think it will extend the law.

But if perchance accidently, inadvertently, or however, there is a slight extension, I do not think that extension of the law would justify nonpassage of the bill. That's what I am trying to say.

Senator NICKLES. Excuse me, but I have to leave now—Senator Kennedy, can you stay here a little while? Senator Grassley is supposed to be here, but it may be a while before he arrives.

Senator KENNEDY. Yes, until just 4:15, then we have the—I am on the DOD conference. They bring up the MX at 4:15 in conference.

Senator NICKLES. Noncontroversial item.

Senator KENNEDY. Noncontroversial. [Laughter.]

In the Armed Services Committee they need all the help they can get.

Senator NICKLES. I do have one additional question. I have heard both of you say that you didn't see this as a major expansion of pre-*Grove City*. There has been a lot of concerns, and there will be other concerns raised later this afternoon, I have read this legislation several times, and it seems to be extremely broad, particularly part (b), "any successor, assignee, or transferee of any such State, subdivision," and so on. This statement is about as broad as you could possibly have it. If it were more narrowly defined and targeted, that is to pre-*Grove City* and not quite as expansionistic as that, would you be that opposed to it if it were to alleviate some of the concerns that different people have raised about this legislation?

Mr. Hooks.

Mr. HOOKS. Go ahead.

Mr. DAYS. Well, I would be opposed to it because I don't think that the language is so exceptional. It really was designed to avoid—this came from regulations, basically —the shifting of funds around or the paper transferring of something that was purchased with Federal funds in order to avoid the implementation or the enforcement of these provisions.

So I think that a court or administrative agency would have to look at this language and determine the extent to which there were transfers or assignments that were designed to frustrate the basic intent of this law. That's how I viewed that language. It is not supposed to attach for all time and all institutions or persons the strictures of these statutes to the Federal funding connection.

Mr. HOOKS. Senator Nickles, let me say I am sorry I didn't respond directly, but I was trying to save time by switching the questions back and forth. And I agree with that. One of the things that really concerns me, the Civil Rights Commission was a result of the first Civil Rights Act law passed by the Congress from 1875 until it was passed in 1957, almost 82 years. And I used to practice law, and sometimes I get a little disturbed that the Civil Rights Commission today, let's face it very honestly, they were created to give a voice to the voiceless. They were not created to represent the majority who had all the rights, but to represent the minority.

And it bothers me that it looks like that our defense attorney is very concerned that the prosecution is not having all the weapons they ought to have. This overconcern of the Civil Rights Commission about the overreach of the law seems a little bit of place to me, because we all know in reality why they were created. And for all of these years they have done a very fine job of raising these points that need to be raised on behalf of people who had not had their rights. And now it seems to be a shift in, as I can only describe it as a defense lawyer, of being overly concerned that the prosecution is having his hands tied. And I just don't know how we can proceed like that, because the Civil Rights Commission is now saying, "Well, we're afraid that it may be that there is a possibility it might overextend just a little bit, and we want to make sure it doesn't."

And that kind of attitude bothers me because I agree with Attorney General Drew Days that some of these terms that are used in this legislation are what I call works of art. They've been used over and over and over again, and the people who write them, if nobody else, they understand precisely what they mean. The courts understand. And they very seldom mean what they appear to mean anyway.

Senator NICKLES. I think that's a good point, and I would concur with it.

Senator Kennedy, did you have some questions?

Senator KENNEDY. Yes, Mr. Chairman.

First of all, I want to welcome Mr. Hooks and Mr. Days very much for joining with us here this afternoon. I think we're extremely fortunate in the presence of Mr. Hooks, who has been involved in the civil rights movement and battling discrimination in our society in all forms over a lifetime, and has been on the firing line, so to speak, in knowing how these programs work and whether the Congress has really fashioned remedies to deal with the injustices which have existed in our society.

And Mr. Days, of course, comes as an enormously gifted and talented head of the Civil Rights Division and who has given a great deal of attention to the enforcement of these particular statutes.

So I think we're very fortunate to have both of them commenting to us on the various proposals and responding to some of these concerns.

Let me ask you, Mr. Hooks, if we don't take the action in overturning the *Grove City* case, we will still have these statutes on the books, the four different statutes that are affected by *Grove City*. What will be the meaning of those statutes unless we deal with the

Grove City? How effective will they be as instruments to eliminate discrimination?

Mr. HOOKS. It seems to me that one of the major problems from the viewpoint of a civil rights group that has to be involved in this kind of litigation is that it puts an undue burden on those of us who have to litigate. The Government should be able to protect the rights of all of its citizens, yet those who are protected by these statutes quite often have to initiate the action and bear the expense, notwithstanding that, as Professor Fried has said, "There is is a gold pot of money out there," we haven't found it yet, the NAACP. I will have to write him and find out where all this litigation money is. We haven't discovered it. [Laughter.]

But it puts an undue burden because if we go to court with a college and prove discrimination in a program, and if you get down to the pinpointing provisions that Attorney General Days talked about, then you still would have to go back if you have another case of discrimination in another department. It could simply wear out those of us who are trying to take advantage of the law by keeping us in court all of the time.

It also, it seems to me, gives to those colleges that might have an intent to do something discriminatory the protection of knowing that, "Well, if I get caught for speeding, they won't also charge me with reckless driving." And that's the effect of it, as I see it. It would simply put an undue burden against those—I mean at the very least, it would put an undue burden against those who have to use these statutes, and it would give to offending institutions the opportunity to take a chance, knowing that the penalty would be relatively light. And to me, that is unnecessary, particularly when most of us felt that the *Grove City* case changed what the law was, and this statute, this new Civil Rights Act of 1984 simply attempts to redo what we think the court did.

Senator KENNEDY. What do you think would have been the result in the period of the 1960's and the 1970's when the efforts were made to eliminate the forms of discrimination based on race in the South, in the North as well, what, if this holding had been the interpretation of the law at that time, do you think that the progress in this country, in our society, would have been undermined?

Mr. HOOKS. Absolutely. I think we would have had an undermining of our progress for the simple reason that— to be very honest, and I have been involved, as you have mentioned, all of my adult life one way or the other in the civil rights movement, and obviously there were a great number of people, once the law was passed, who made every honest, sincere effort to obey it. There were others who had to be dragged kicking and screaming, who resisted every step of the way, who used every comma, every punctuation mark that they could use as a mechanism not to follow the law.

And it was the broad interpretation, in my judgment, that brought these recalcitrant—and I am not going to sit here and try to say how many were willing to go forward and how many were dragged into compliance—but the fact remains that, in my judgment, the progress of civil rights would have been enormously slowed and impeded had we not had this concept of a very wide application of the title IX, title VI, and the other titles of the 1964 Civil Rights Act.

Senator **Kennedy**. Mr. Days, I just have a few questions. One of the points that's constantly raised about this particular drafting—you don't have to look at that red light clearing the witness, nor does he, I hope; I will just be a few minutes—has been on the question of whether the language that has been fashioned really conforms with what those of us who are supporting it or cosponsoring it—in my case, having introduced it with Senator Packwood—believe it to achieve and accomplish; and that is the law as it was interpreted by the majority of the district and circuit courts prior to the *Grove City* case.

And in looking through your statement, you make reference to that.

And we have attempted to use the previous, the existing, statutes in order to try and ensure that it would conform with that. How are we going to respond to these examples which have been addressed to various witnesses during the course of these hearings and the Judiciary Committee, the ones that I have attended? And what is your sense about, and what can you tell us about, the particular language and its really reaching back to the kind of interpretation of the law that it had when you were in charge of enforcing it? How do we deal with those who say that that is not only not so, but just on the face of it it's subject to a very expansionary interpretation and then we go on through for a half hour or 45 minutes with all these various scare kinds of illustrations or examples in order to try and in some way either show that the language is vague and indefinite, therefore unenforceable, or that it is so subject to such a gross expansion that it would run contrary to what all of us have stated is the interpretation and purpose of the act?

Mr. **Days**. Well, I think, Senator, that first of all, I appreciate being here, and I appreciated your words.

The prior enforcement experience and the judicial interpretation with respect to these statutes has really been one of not viewing them as what I might call the Civil Rights Accountants Act—namely, that one would sit down like an accountant and look at column or line and follow the dollars and cents everywhere they went.

It started from the presumption that Federal funds were going to an institution, and there was broad coverage. And then the administrative agency or the courts would, if it got to the point of actual termination of funds, then try to ensure that congressional will was satisfied; namely, that it would not be a sweeping cutoff of funds, but the funds would be cut off in those programs that actually discriminated against people protected by these Acts or supported in some way discrimination elsewhere.

Now, the use of the term "recipient" is drawn from administrative regulation. And it's a term that is a term of art, it seems to me, has been interpreted, has been accepted by the courts.

I was asked by Senator Nickles about the "successor, assignee, transferee" language. As I understand that, that is really responsive to situations very prevalent in the South until quite recently, when there would be a shifting of buses or of books or of chairs from a public school to a segregated academy, and the argument was, "We're clean. The fact that we're providing assistance to others who segregate is not a reason for us to be subject to the enforcement mechanisms of the Federal Government."

And the response was, "That's so transparent that the Federal Government should not be stopped at the door in trying to carry out the objective of these laws."

Insofar as support is concerned, I think that really comes from a concept that I refer to in my testimony; namely, that there are situations where although the Federal program, the federally funded program, is not discriminating itself, funds from that program are really churned in with the funds to support a larger operation of discrimination.

Take a school district in which funds are going to two or three particular programs, and it's found that those programs are not discriminatory, but the surrounding circumstance is one of racial or sex discrimination or discrimination against the handicapped or the aged. The administrative practice was not to view those as operating in hermetically sealed separate cabinets, but related to one another.

So the supporting language is again, I think to get away from—I don't mean to disparage accountants; they are very important in our society, and some of my best friends are accountants——

[Laughter.]

Mr. DAYS. But I want to underscore the fact that Congress did not have in mind this nickel-and-diming—Senator, forgive me—approach to insuring that recipients of Federal funds did not discriminate.

Senator NICKLES. Would the Senator hold just for a second? It's necessary for me to leave. I apologize to our current panelists as well as our other panelists. It is possible that I will return. It's my belief that Senator Grassley will be here shortly. Senator Kennedy, if it is necessary for you to leave, would you please, just recess until Senator Grassley appears.

Thank you very much.

Senator KENNEDY [presiding]. Thank you very much.

The charge has been made that basically we're putting, you know, a red tag on every Federal dollar. How do you respond to that, you know, tracing it throughout the economy in the determination of coverage?

Mr. DAYS. I don't think that's the case. I know that Mr. Hooks wants to respond to that.

But let me say that the *Grove City* College decision did have some good and some bad in it. Certainly, the good was the recognition that the institution was a covered institution for title IX purposes, and then this limitation on what was the program was the bad part of it.

But it also rejected the argument of *Grove City College* that somehow finding that the receipt by the college of scholarship funds through the students would open up the door to all kinds of expansion of Federal power and said that there is a way of distinguishing those situation; and that is, can the college make an intelligent decision about whether it wants to be covered? Can it knowingly decide whether it wants to be subject to these acts or is it unwittingly wrapped in this web of Federal enforcement machinery?

And it said, for example, with respect to the grants, the college is in a position to know which students are receiving this type of scholarship aid, and if they don't want to be subject to Federal enforcement, they can reject that aid or reject students that are getting into college with that aid.

And it mentions food stamps, and it mentions some other examples. And I think that while I am not certain that that has been consistently the way of looking at this issue, as I said earlier, the program-by-program analysis has really been a heavily factual one. I think that's a helpful way of at least thinking about things like food stamps.

There is also, as I understand it, an explicit exemption for what are called mom-and-pop or small grocers under the act that relates to food stamps. So there has been some recognition of the need to limijt the reach of Federal power.

The short answer is that I don't think it does put a tag on every Federal dollar. That has never been the case, and there is no reason why that should be so under this legislation.

Senator KENNEDY. Just finally, because we are going to move on, in your own judgment—I think one of the powerful points that you make here besides your own excellent presentation is the fact that you have the strong support of former Attorney Generals and chairmen of the Civil Rights Division, Republican and Democrat, over a very considerable period of time, who view the enforcement of it as you—in your own review of the cases and of the enforcement, did you find abuses, the kinds of examples and the kinds of harassing or the kinds of reaching that have been so associated with at least many of those who oppose this legislation at the present time? Is that kind of thing realistic?

You know, so many of us who were involved in the shaping of this legislation and other civil rights legislation here all of the kinds of egregious examples that are pointed out, and yet we find—I am sure it was true when these provisions were drafted, regulations were drafted sometime ago. Did you ever find these kinds of egregious examples actually being initiated by any of those who had responsibility for implementing this legislation over the period of years?

Mr. DAYS. No, Senator Kennedy——

Senator KENNEDY. Are they strawmen, really real, or are they——

Mr. DAYS. It was a strawman.

Senator KENNEDY. Strawperson. [Laughter.]

Mr. DAYS. The fact is that there are a number of Federal officials who have to enforce these statutes, and I am sure there were abuses now and again, but I think that's always the case.

The important fact for me is that if any of those abuses occurred at the lower level, they were corrected, and one would search in vain, it seems to me, in the case law or in the administrative record for examples of abuses that were initiated by or condoned by those who were appointed by the President or at other high levels who had to enforce these statutes. That's simply not the case.

Mr. HOOKS. Let me just make one other reply to that, Senator. I can assure you from the viewpoint of an organization like the

NAACP, where we initiate actions either directly or bring them to the attention of the EEOC or whatever, that we get hundreds of complaints. And our big job is to try to make sure that the complaints that we actually take and move forward with are substantive and real. We don't have the money, the personpower, the resources to get involved in peripheral cases. That may be to our—I mean I am not very proud of that, but the fact is that if you were to come by any of our local offices of the national office and see the number of complaints we get, how we have to plow through them. And obviously, we attempt to get those that are most substantive so we can win and hope to set some precedents to help others. To get into the marginal cases or these strawman situations that have been set up, these very doubtful, chancey, iffy cases of trying to make the law apply to the ends of the Earth is simply something that most of us in the field that have to do it simply reject out of pragmatic consideration. We just don't have the ability to do it.

Mr. DAYS. Let me just underscore something I said earlier, at least from the administrative enforcement standpoint. And that is, one of the reasons why these hypotheticals are purely hypotheticals is that I know when I was in the Justice Department dealing with not only my own staff and people in the Justice Department, but, with other executive agencies, one of the first things we ask ourselves when we were presented with a complaint, an allegation of discrimination, was: which department has the most realistic chance of dealing with this or has the most direct responsibilit for dealing with this problem, and not simply using a blunderbuss to try to deal with some of these issues.

If it involved food stamps, the agency that would be responsible for determining the reach of its own statutes and perhaps some of these other statutes, would be the Agriculture Department, trying to deal with its own panoply of laws and do the job if it turned out to be a well-founded complaint, to deal with it in that way.

And so one never had to reach using these four statutes to get at every imaginable instance of discrimination. I am happy to say that there are other laws besides these that deal in some cases more precisely with some of the issues that have been raised.

Senator KENNEDY. Well, this has been very helpful. If you don't mind, we might ask maybe a few written questions as well and make that a part of the record. We've got a full panel here, and we're going to do the best we can. But your comments have been very, very helpful to us, and I am grateful to you for them.

I think the final point that I would make, in your statement you believe that the language is sufficiently precise and exact that your belief that what this language will move us back, as Griffin Bell and others even within this administration have said, back to the way that this legislation was enforced prior to *Grove City.*

Mr. HOOKS. Yes, sir.

Mr. DAYS. Yes, exactly.

Senator KENNEDY. OK. I want to thank you very much.

Mr. DAYS. Thank you.

Mr. HOOKS. Thank you very much.

Senator KENNEDY. We had intended to have Senator Javits, who is very, very much interested in this issue and has been a strong supporter of our legislation and was going to appear and testify today, but is unable to do so. And I will insert his statement in the record following the testimony of these two witnesses, Mr. Hooks and Mr. Days. And we will submit those at this point.

[The prepared statement of Senator Javits follows:]

STATEMENT OF JACOB K. JAVITS BEFORE
THE SENATE COMMITTEE ON LABOR AND
HUMAN RESOURCES AT A HEARING ON
TUESDAY, JUNE 19, 1984 ON THE GROVE
COLLEGE LEGISLATION (To be read into
the record by Joshua Javits, Esq.)

As I understand it the bill would specifically define the "recipient" of federal aid as responsible for excluding any person on the ground of race, color or national origin from participation in or from being denied the benefits of, or from being subjected to discrimination under any program or activity receiving federal financial assistance all the foregoing as provided under Section 2000 (d)(1) of the U. S. Code annotated; (Title VI, Section 602 of the Civil Rights Act of 1964).

While a member of the Senate where I served from the State of New York from 1957 to January 1981 I had a very active participation in the debates respecting the 1964 Act. Indeed, I was specifically concerned with Title VI because of the fact that it sought effective remedies for discrimination invalid and unlawful under our Constitution. In the debates the intent and purpose of the various titles of the Civil Rights Act were very carefully considered and intensively debated. It is my considered judgment that the purpose and intent with which the Law was enacted were precisely within the dimensions which the Bill you are considering seeks to achieve and the Grove College case decision of the U. S. Supreme Court to which it is addressed changed the thrust of the legislation which we had enacted in 1964 and that, therefore, it is proper for the Congress to define specifically and by law its purpose and intent.

Also, I was very deeply involved in the enactment of the Higher Education Amendments of 1972 and in the Age Discrimination Act of 1975 of which, indeed, I was one of the authors and my view is borne out by the debates, conference considerations and final enactment of these laws as well. I call specific attention to this clause in Section 2000 (d) (1) "...but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found,...". I point out that the word "recipient" is indeed contained in this very important clause.

As you would expect as a skilled lawyer myself after so many years of active practice and participation in the House and Senate I have no wish to reverse the Supreme Court if it can be avoided by legislative action but the Court itself has recognized through the years of its service to the people that there are often appropriate cases in which where it takes a different view of the purpose and intent of the Congress than the Congress' own view of its purpose and intent it is quite appropriate for the Congress to act to make clear its intent and purpose by a law.

-2-

We had intended that the landmark Civil Rights Act of 1964 should be effective in a variety of situations which we felt were needed to assure the individual rights which should be enjoyed under the Constitution. That purpose is best expressed in Section 2000 (d)(1) which I have quoted above which is flat and unequivocal. To make it effective I believe the measure before you needs to be enacted.

I am sure that the disquiets expressed by the Administration of the ambit of the legislation can be readily met provided it is within the fundamental purpose of the legislation. If we wish to make the promise of Section 2000 (d) to wit that "no person in the United States shall on the ground of race, color or national origin, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance" then we must establish that the remedy must be enforceable against the recipient of such "federal financial assistance...". The promise to be performed is according to what our Constitution intended.

* * * * * *

Senator Kennedy. We will recess for just a few moments, and then the committee will come back into session again. Senator Grassley will be here in just a few minutes.

[Brief recess.]

Senator Grassley [presiding]. I would like to reconvene this hearing of the Senate Committee on Labor and Human Resources.

The third panel will be William McEwen, director of equal employment affairs, the Monsanto Co., St. Louis, MO; Chuck Fields, assistant director of employer relations, business, government, policy, for the U.S. Chamber of Commerce; and John Motley, director of Federal legislation for the National Federation of Independent Business.

After this panel has completed testifying, we will have a few questions which I want to direct to each witness if time permits. And I would hope that each individual would feel free to comment upon any of the questions raised by me or any other Senators. And we hope that we have time to do all that.

William McEwen, I would like to have you go first.

Oh, I guess Mr. Fields has the lead? OK.

Voice. He's left.

Senator Grassley. OK, go ahead then.

STATEMENT OF WILLIAM S. McEWEN, DIRECTOR, EQUAL OPPORTUNITY AFFAIRS, MONSANTO CO., AND CHAIRMAN, HUMAN RESOURCES STEERING GROUP, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. McEwen. Mr. Chairman and members of the committee, I am William McEwen, director of equal opportunity affairs with Monsanto, and I am testifying today on behalf of the National Association of Manufacturers as chairman of the human resources steering group.

The National Association of Manufacturers is an organization of over 13,600 corporations of every size and industrial classification located in every State. Our members employ 85 percent of the workers in manufacturing employment and produce over 80 percent of the Nation's manufactured goods. And we very much appreciate this opportunity to express our opinions before the committee on the Civil Rights Act of 1984.

Initially, we would like to state that the National Association of Manufacturers opposes any discrimination in whatever form or however manifested against persons on the basis of race, sex, color, national origin, handicap, religion, or age. We also would like to emphasize that we support efforts to remedy the program-specific limitations decided in the case of *Grove City College* v. *Bell* through Senate bill S. 2568.

However, it is our concern that Senate bill S. 2568, as written, far exceeds remedying the specific problems created by *Grove City* and could have sweeping ramifications for private as well as public institutions and employers.

And while Senator Dole has emphasized that this is not the intent of the sponsors to break new ground in the Civil Rights Act of 1984, many others, including those in the Attorney General's office, believe that this bill will in fact have broad ramifications.

It's the association's position—the association's position is clear: if it is indeed the intent of this committee to merely remedy the *Grove City* situation, we believe that the language within the bill should be clarified to narrowly address the specific problem.

However, if it is the intent of this committee to broaden the scope of title IX of the Educational Amendments of 1972, title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act, and the Age Discrimination Act of 1975, we would like that articulated and further debate scheduled.

The bill, as drafted, raises three major concerns for the members of the National Association of Manufacturers. First, that interpretation of recipients of Federal funds could be construed such that any employer who receives any direct or indirect Federal funding could be covered by all the aforementioned Acts, subjecting them to Government scrutiny and burdensome paperwork requirements.

Second, the enforcement of these regulations under this bill would be diffused and duplicative.

Third, the bill will expand the right of private attorneys to bring actions.

And with these items, it's our concern that the bill would do much more than simply reverse the Supreme Court in interpretation of title IX and restore the regulatory status quo that was present before *Grove City*.

Assistant Attorney General William Bradford Reynolds testified before the House Judiciary and Education and Labor Committees that this bill may make broad changes in the structure of our antidiscrimination laws. If that's the case, this is a major concern of NAM.

As before me, we believe that the term "recipients" needs better defining. As now written, one would be hard pressed to discover a private employer who would not be considered at least an indirect recipient of Federal assistance under the proposed amendment.

For instance, many companies participate in federally funded job training programs such as the Job Training and Partnership Act. This legislation could very well be interpreted to mean that the entire operation of a private entity would be subjected to the four statutes if any aspect of its operation received Federal assistance.

An employer might well be reluctant to participate in such a training program, fearing that the Government would intervene in every aspect of its operation. The net result would be that minorities and underprivileged persons who would most benefit from such a program may never get the opportunity to enter the job training in the private sector.

There are many other examples to illustrate the problems to be encountered by the broad wording of "recipient" contained in this bill. For instance, there are many companies that sell or lease equipment for federally funded construction projects, and because of this limited activity, they may be viewed as receiving Federal assistance through another entity that receives direct Federal aid. The result, of course, would be the coverage of the employer's entire operation by all four statutes. Employers who have programs will not relish contending with multiple layers of regulations and reviews because of their indirect contact with these Federal funds.

We are further concerned that the statutory construction of "recipient" to mean "indirect recipient" under this legislation is a problem. Creative interpretations of "indirect recipients" of Federal assistance might be construed to include employers who participate in food and Medicaid programs or receive federally insured loans.

As another example that was mentioned, the employer's entire operation would then be subjected to discrimination law enforcement under the four statutes.

Another feasible construction might include a situation like this: The Civil Aeronautics Board provides subsidies for small airlines to provide essential services to small communities that cannot be served profitably. A flight from city A to city B that receives such a subsidy would be a covered program or activity under the current law. But the continuation of the flight from city B to city C would not be, unless it also received a subsidy.

Under Senate bill S. 2568, not only would flight from city B to city C be covered, but all the airline's flights would be covered.

Sponsors of this legislation may be clear about the scope of this legislation, and many argue that the coverage of this bill is not meant to apply to the "mom-and-pop" grocers who accept food stamps or small businesses that participate in the Job Training and Partnership Act. However, it is our opinion that the legislation is ambiguous and is raising serious questions throughout the business community as to what is intended.

It will be the courts and the various enforcement agencies which will enforce these amendments and conflicting interpretations are likely because of the bill's ambiguity.

As a result, we urge that the definition of "recipient" under this legislation be amended and clarified. If such action is not taken, there may well be significant Federal intrusion in employers' operations in situations that were not previously envisioned.

Now, I have other written testimony, but because of the time I would like to skip to the summary, and I will be ready for questions that you might have.

I would conclude by saying that the NAM supports vigorous enforcement to eliminate discrimination. Our concerns are that the legislation, as proposed, will result in serious intrusion into private endeavors far removed from any participation with Federal funding. We feel that recipients of Federal aid, as defined in this bill, should be clarified to encompass only the specific target group intended by this Congress. That way, we will not have to wait and see how courts and agencies will interpret the legislation.

Second, the NAM is concerned that the bill presents a confusing multiple-agency enforcement scheme with many agencies ill equipped to enforce civil rights legislation. It will impose extremely burdensome reporting and compliance requirements and opportunities for forum shopping.

Finally, we would like to take this opportunity to urge the Labor and Human Resources Committee to clarify exactly what is the intent of this bill. The Department of Justice seems to believe it will have broad, sweeping ramifications. The Attorney General's Office has indicated that it does as well. If indeed it is not the intent of this Congress to include private entities that receive only indirect Federal funding as targets of this legislation, we would like to see the language of the bill more narrowly drawn to reflect that intent.

Thank you.

[The prepared statement of Mr. McEwen follows:]

TESTIMONY OF
WILLIAM S. McEWEN
DIRECTOR, EQUAL OPPORTUNITY AFFAIRS
MONSANTO COMPANY
ON BEHALF OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS
ON
CIVIL RIGHTS ACT OF 1984
BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE
UNITED STATES SENATE
JUNE 26, 1984

INTRODUCTION

Mr. Chairman and members of the Committee, I am William McEwen, director of Equal Opportunity Affairs with Monsanto, Inc. I am testifying today on behalf of the National Association of Manufacturers as chairman of the Human Resources Steering Group for NAM. Accompanying me today is Sharon Spigelmyer, the Senior Associate Director of NAM's Human Resources and Equal Opportunity Committee. NAM is an organization of over 13,600 corporations of every size and industrial classification located in every state. Our members employ 85 percent of the workers in manufacturing employment and produce over 80 percent of the nation's manufactured goods. We very much appreciate this opportunity to express our opinion before this Committee on the Civil Rights Act of 1984.

Initially, we would like to state that the National Association of Manufacturers opposes any discrimination, in whatever form or however manifested, against persons on the basis of race, sex, color, national origin, handicaps, religion or age. Furthermore we support efforts to remedy the program specific limitations decided in the case of Grove City College v. Bell.

However, it is our concern that this bill, as written, far exceeds remedying the specific problems created by Grove City and could have sweeping ramifications for private, as well as public, institutions and employers. While Senator Dole has emphasized that it is not the intent of the sponsors to break new ground in the Civil Rights Act of 1984, many others, including those in the Attorney General's office, believe this bill will in fact have broad ramifications. If it is indeed the intent of this Committee to merely remedy the Grove City situation, we believe that language within the bill should be clarified and narrowly addressed to the specific problem. However, if it is the intent of this Committee to broaden the scope of the Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act and the Age Discrimination Act of 1975, we would like that articulated and further debate scheduled.

The bill, as drafted, raises three major concerns for the National Association of Manufacturers's members. First, that interpretation of "recipients" of federal funds could be construed such that any employer who received any direct or indirect federal funding could be covered by all these acts, subjecting them to government scrutiny and burdensome paperwork requirements. Second, enforcement of these regulations under this bill will be diffused and duplicitous. And thirdly, the bill will expand the right of private attorneys to bring actions.

BACKGROUND

The Supreme Court's decision in Grove City College v. Bell, was twofold: First, it held that an educational institution that indirectly receives federal funds is subject to the discrimination provisions of Title IX of the Education Amendments of 1972. But the more important aspect of the court's ruling was that Title IX applies only to the particular department of the institution that receives federal funds and not to the entire university.

It is the latter aspect of the Grove City decision which this legislation attempts to address. We are concerned this bill would do much more than simply reverse the Supreme Court's intrepretation of Title IX and restore the regulatory status quo present before Grove City. Assistant Attorney General Wiliam

Bradford Reynolds testified before the House Judiciary and Education and Labor Committees that this bill may make broad changes in the structure of our antidiscrimination laws. That is our concern, too.

Recipient of Federal Financial Assistance:

The first major change made by this legislation is the modification of each of the statute by deleting the term "program or activity" and substituting the term "recipient." Each pertinent provision of Titles VI and IX, Section 504 pertaining to handicap discrimination and the Age Discrimination Act of 1975 would be thus amended. The result of this change might be that the entire operations of any private entity which receives federal funds or receives such funds indirectly from a direct recipient of federal funds, would be covered by all four statutes.

One would be hard pressed to discover a private employer who would not be considered at least an indirect recipient of federal assistance under the proposed amendments. For instance, many companies participate in federally funded job training programs such as the Job Training Partnership Act. This legislation could very well be interpreted to mean that the entire operations of a private entity would be subject to the four statutes if any aspect of its operations receives federal training assistance. An employer might well be reluctant to participate in such a training program, fearing that government would intervene into every aspect of its operation. The net result would be that minorities and under-privileged persons who would most benefit from such a program, may never get the opportunity to enter job training in the private sector.

There are many other examples to illustrate the problem to be encountered by the broad wording of "recipient" contained in this bill. For instance, there are many companies that sell or lease equipment for federally funded construction projects. Because of this limited activity, they may be viewed as receiving federal assistance "though another entity" that receives direct federal aid. The result, of course, would be coverage of the employer's entire operation by all four statutes. Employers who have programs will not relish contending with multiple layers of regulations and reviews because of their indirect contact with federal funds.

We are further concerned that the statutory construction of recipient to mean "indirect recipients" under this legislation. Creative interpretations of "indirect recipient" of federal assistance might be constructed to include employers who participate in food and medicare programs or receive federally insured loans. As in the other examples mentioned, the employer's entire operation would then be subject to discrimination law enforcement under all four statutes.

The connection between receipt of federal assistance and the employers we have mentioned is extremely tenuous. The new definition of "recipient" would thus create undue hardships for private employers. They would be subject to all the civil rights regulations and enforcement procedures of all the cognizant federal agencies with respect to every aspect of their particular enterprise by even the remotest form of federal assistance.

Another feasible construction might include this situation: The Civil Aeronautics Board provides subsidies for small airlines to provide essential services to small communities that cannot be served profitably. A flight from city A to city B that receives such a subsidy would be a covered "program or activity" under current law, but the continuation of the flight from city B to city C would not be unless it also received a subsidy. Under S. 2568, not only would the flight from city B to city C be covered but also all of the airline's flights would be covered.

Sponsors of this legislation may be clear about the scope of this legislation. They may argue that the coverage of this bill is not meant to apply to the grocer who accepts food stamps or the small business that participates in job training assistance program. However, the legislation is ambiguous and is raising serious questions throughout the business community as to what is intended. It will be the courts and the various enforcement agencies which will enforce these amendments and conflicting interpretations are likely because of the bill's ambiguity. As a result, we urge that the definition of "recipient" under this legislation be amended and clarified. If such action is not taken there may well be significant federal intrusion in employers' operations in situations that were not previously envisioned.

Multiple Agency Enforcement:

Another concern has to do with multiple agency enforcement created by this bill. Employers accused of discrimination are already subject to investigation by litigation in several different forums: The Equal Employment Opportunity Commission, the Office of Federal Contract Compliance Programs, federal suits, state agencies, state private suits and arbitrations. The pending legislation would add greatly to the bureaucratic load companies must bear. The bill would retain enforcement jurisdiction in all current agencies, but also give enforcement power to any federal agency which provides federal funds.

If one or more parts of an employers' operation received federal aid, an enumerable number of federal agencies could have jurisdiction over all the operations of the company. Further, the company might also find itself adrift in a sea of reporting requirements and compliance reviews. This makes no sense at a time when government is striving toward regulatory reform.

The problems created by multiple enforcement agencies do not end with the paperwork. One important consideration is that many of the agencies that will have to make determinations under this bill lack expertise in employment and civil rights laws. Lack of consistency is bound to be the hallmark of diffuse enforcement. This lack of consistency could result in confused legal standards and agency enforcement practices that the employer has depended on from the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Program..

With any number of agencies to choose from, individuals will undoubtedly begin forum shopping. And, an individual may file the same complaint with numerous agencies, all with equal power of enforcement. This would be costly to the government and unreasonably burdensome to employers. Furthermore, the cases of discrimination may, in appropriate situations, still be referred to the Justice Department, which may sue in federal courts. It is obvious that a litigant would seek to bring his claim before the most sympathetic forum of the many available.

The proliferation of lawsuits and complaints resulting from this provision cannot be overstated. An employer would be subject to reporting requirements, compliance reviews and enforcement from several federal agencies. There would be an erosion of legal standards and precedent upon which an employer may rely. Further, with the great availability of tribunals, there will be an inordinate opportunity to file duplicate claims and forum shop.

Private Right of Action

The last area of concern focuses on the potential for an immense increase in private causes of action in federal courts as a result of this bill. Titles VI and IX, the Rehabilitation Act and the Age Discrimination Act allow for private causes of action against "recipients" of federal funds. It should be noted that none of these statutes require the same procedural steps that have to be taken before the EEOC and OFCCP. Also, there would not be any bar to private litigants pursuing these private remedies in addition to filing charges with the EEOC and OFCCP. This private right to action may prove very costly to the employer since an award of attorneys fees can be made to prevailing plaintiffs.

CONCLUSION

In conclusion, NAM supports vigorous efforts to eliminate discrimination. Our concerns are that the legislation as proposed will result in a serious intrusion into private endeavors far removed from any participation with federal funding. We feel that "recipients" of federal aid as defined in this bill should be clarified to encompass only the specific target group intended by this Congress. That way, we will not have to wait to see how courts and agencies will interpret such legislation. Secondly, NAM is concerned that the bill presents a confusing multiple agency enforcement scheme with many agencies ill-equipped to enforce civil rights legislation. It will impose extremely burdensome reporting and compliance requirements and opportunities to forum shop.

Finally, we would like to take this opportunity to urge the Labor and Human Resources Committee to clarify exactly what is the intent of the bill. The Department of Justice seems to believe it will have broadsweeping ramifications. The Attorney General's office has indicated it does, as well. If, indeed, it is not the intent of this Congress to include private entities that receive only indirect federal funding as targets of this legislation, we would like to see the language of the bill more narrowly drawn to reflect that intent. Thank you.

Senator GRASSLEY. Thank you, Mr. McEwen.

Mr. Fields, I think you were the—oh, well, proceed in whatever order I introduced you in, go that way.

STATEMENT OF FREDERICK J. KREBS, DIRECTOR, EMPLOYER RELATIONS SECTION, U.S. CHAMBER OF COMMERCE, ACCOMPANIED BY MARK A. DE BERNARDO, MANAGER OF LABOR LAW SECTION

Mr. KREBS. Mr. Chairman, my name is Frederick J. Krebs. I am the Director of the Employer Relations Section for the U.S. Chamber of Commerce. And with me is Mark de Bernardo, the Manager of our Labor Law Section.

On behalf of the U.S. Chamber, we are pleased to comment on S. 2568, the civil rights of 1984. I have submitted a written statement, which I would appreciate being entered into the record.

At the outset, I wish to emphasize that the U.S. Chamber is firmly committed to the goal of equal employment opportunity for all. We have no position, however, on S. 2568 or the repeal of the *Grove City* decision. We expect our board to develop a position in the very near future.

What we are concerned about is the lack of adequate deliberation and the exceptionally rapid consideration of this bill in view of its potentially wide-ranging impact and ramifications.

Proponents of S. 2568 offered this bill as a simple repeal of the Supreme Court decision in *Grove City* v. *Bell.* It seems clear that the bill does more. S. 2568 amends not only title IX, but three other significant civil rights statutes: Title VI of the 1964 Civil Rights Act; section 504 of the Rehabilitation Act of 1973; and the Age Discrimination Act of 1975.

Such a broad-reaching bill deserves careful analysis and deliberation because of its legal, policy, and constitutional ramifications. The U.S. Commission on Civil Rights, the Department of Justice, many members of the academic community, and other concerned and potentially affected parties have raised serious questions and concerns about the bill.

Many concerns have not been adequately addressed. Many questions remain unanswered. These concerns include: effects on the relationship between Federal and State governments; expansion of Federal control of private employment practices; ambiguities in the definitions of crucial terms such as "recipient, transferee, and Federal aid;" administration and enforcement, and the expansion of private rights of action.

Examples of unanswered questions includes whether pharmacists would be subject to regulation because they receive payment from medicare or medicaid; whether grocery stores will be subject to regulation because they accept food stamps; whether suppliers of durable medical equipment would be subject to regulation if they take assignments from their customers of medicare part B reimbursements; whether farmers who receive crop subsidies would be subject to regulation.

Concerns such as those that I have expressed and questions such as these should be addressed directly and answered by Congress, and not left to future determination by a judge or regulatory agency.

Legislative inquiry and deliberate analysis are not opposition to civil rights. Changes in our civil rights laws of the apparent magnitude contemplated by this bill should not be adopted hastily, inadvertently, or without the development of a meaningful legislative history.

For these reasons, we respectfully urge you to slow down the process and defer the markup which is scheduled for tomorrow, and give this legislation the analysis and the consideration that it deserves.

I appreciate your consideration of our views, and I will be happy to respond to any questions.

[The prepared statement of Mr. Krebs follows:]

Chamber of Commerce of the United States of America
Washington

STATEMENT
on
S. 2568, THE CIVIL RIGHTS ACT OF 1984
before the
SENATE LABOR AND HUMAN RESOURCES COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Frederick J. Krebs
June 26, 1984

I am Frederick J. Krebs, Director of the Employer Relations Section for the Chamber of Commerce of the United States. With me today is Mark A. de Bernardo, Manager of Labor Law for the Chamber.

On behalf of the Chamber's nearly 200,000 business members, more than 85% of whom are small firms with less than 100 employees, I am pleased to comment on S. 2568, the Civil Rights Act of 1984.

While the Chamber has no position with respect to S. 2568, we remain firmly committed to the goal of equal employment opportunity for all. We are concerned about the lack of adequate deliberation and the exceptionally rapid consideration of this bill in view of its potentially wide-ranging impact and ramifications .1/

Proponents of S. 2568 offered this bill as a simple repeal of the February 28, 1984 Supreme Court decision in Grove City College v. Bell.2/ This decision held that federal tuition grants to students do not trigger college-wide coverage of programs under Title IX of the Education Act Amendments of 1972.3/ Many persons now believe that S. 2568 could have a much broader impact on both the public and private sectors.

1/ In view of the bill's potential scope, the Chamber has begun to develop policy. A position is expected in the very near future.

2/ 104 S. Ct. 1211 (1984).

3/ 20 U.S.C. Sect. 1681.

S. 2568 amends not only Title IX but three other significant civil rights statutes:

- Title VI of the 1964 Civil Rights Act; [4]
- Section 504 of Rehabilitation Act of 1973; [5] and
- The Age Discrimination Act of 1975. [6]

Such a broad-reaching bill deserves careful analysis and deliberation because of its legal, policy and constitutional ramifications.

The United States Commission on Civil Rights, the Department of Justice, many members of the academic community and other concerned and potentially affected parties have raised serious questions and concerns about the bill. Many concerns have not been adequately addressed; many questions remain unanswered.

These concerns include:

- effects on the relationship between federal and state governments;
- expansion of federal control of private employment practices;
- ambiguities in the definitions of crucial terms, such as "recipient," " transferee" and "federal aid";

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[4] 42 U.S.C. Sect. 2000d.

[5] 29 U.S.C. Sec. 794.

[6] 42 U.S.C. Sect. 6102.

- administration and enforcement; and
- expansion of private rights of action.

Examples of questions of concern to the business community remaining unanswered include:

- Whether pharmacists would be subject to regulation because they receive payment from Medicare or Medicaid?
- Whether grocery stores will be subject to regulation because they accept food stamps?[7]
- Whether suppliers of durable medical equipment would be subject to regulation if they take assignments from their customers of Medicare (Part B) reimbursements?
- Whether farmers who receive crop subsidies would be subject to regulation?

Questions such as these should be addressed directly and answered by Congress -- and not left to future determination by a judge or regulatory agency. Legislative inquiry and deliberate analysis is not opposition to civil rights.

For the foregoing reasons, the Chamber believes that S. 2563 has not received adequate consideration or deliberation and that the markup scheduled for June 27, 1984 should be deferred. Changes in our civil rights laws of the apparent magnitude contemplated by this bill should not be adopted hastily, inadvertently, or without the development of a meaningful legislative history.

Thank you for your consideration of our views.

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[7] The Report by the House Judiciary Committee on H.R. 5490, which is identical to S. 2568 in virtually all respects, seems to indicate an intention to extend coverage to businesses involved in the Food Stamp Program. See H. Rept. 98-829, April 12, 1984 at p. 31.

Senator GRASSLEY. Thank you, Mr. Krebs.

Mr. Motley.

STATEMENT OF JOHN J. MOTLEY III, DIRECTOR OF FEDERAL LEGISLATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. MOTLEY. Thank you, Mr. Chairman.

NFIB appreciates the opportunity to testify here today on behalf of its 570,000 members across the country and express our concerns about S. 2568.

I am not here as an expert constitutional witness, nor am I here to support the bill or to oppose it. In fact, it's very unusual for NFIB to appear and testify on a piece of legislation on this matter. We simply do not or have not in the past gotten involved in civil rights legislation.

I am here to express our concern over the confusion about the impact and the reach of this particular piece of legislation. The language of this legislation we consider to be extremely broad and ambiguous about its impact on small firms. The real problem that we see is the definition of the word "recipient" and how far it reaches down the line.

Let me give you what I see to be a problem there. Small business generally tends to avoid Federal programs like the plague because they're afraid of the paperwork that's involved, they're afraid of regulatory obligations, they are afraid of legal actions that might come from it.

The Government, on the other hand, is constantly trying to involve small business in its programs, whether it be job creation or job training or whether it be in defense procurement.

I think you had an excellent example of this just last week on the floor when you yourself offered several amendments to open up the process for small business participation.

If the critics or those who have fears about this particular piece of legislation are correct, and there is increased Government involvement in these processes, then it will simply serve to drive small businesses farther away from any involvement with the Federal Government.

We would urge you to clarify and tighten the language, especially in the definition of "recipient," in S. 2568 before it moves out of this committee. We have no suggestions right now as to how you might do this, but we would be very willing to work with the committee in any way so that the language could be clarified and tightened.

Thank you, Mr. Chairman, for hearing my testimony, and we will be glad to answer any questions you might have.

[The prepared statement of Mr. Motley follows:]

NFIB National Federation of Independent Business
The Guardian of Small Business

STATEMENT OF

JOHN J. MOTLEY III
DIRECTOP OF FEDERAL LEGISLATION

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Before: Senate Committee on Labor and Human Resources
Subject: S. 2568, The Civil Rights Act of 1984
Date: June 26, 1984

Mr. Chairman, the National Federation of Independent Business (NFIB), which represents over a half million small and independent business members, appreciates this opportunity to discuss S. 2568, the Civil Rights Act of 1984.

We are not here today to give expert testimony from the standpoint of constitutional law, nor are we here to indicate our support or opposition to S. 2568 as currently drafted. We are here because of our concern over the confusion surrounding this bill. What the bill is intended to accomplish and what some sources are purporting it will accomplish appear to be quite different. As a result, we are placed in the difficult position of being unable to discern, with any certainty, what the impact of this legislation would be on the small business community.

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The Supreme Court's decision in Grove City College v. Bell was twofold. First, the Court held that the College was a "recipient" of "Federal financial assistance" by virtue of such assistance being given to a student. In other words, the institution is subject to whatever regulations are tied to federal support even if the institution itself does not receive direct support.

However, the Court then ruled that only the "education program or activity" of the College that "received" federal assistance, and not the institution as a whole, was subject to Title IX of the Education Amendments of 1972. Therefore, discrimination is subject to Federal action on a program-or activity-specific basis.

The phrase "program or activity" as used in Title IX is also used in the three main statutes banning discrimination on grounds of age, handicap, or race. Presumably to forestall constraints on other civil-rights enforcement procedures as a result of the Grove City decision, S. 2568, while specifically intended to reverse the decision affecting discrimination in education, amends all four key civil rights laws (the Education Amendments of 1922, the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and the Civil Rights Act of 1964). All four acts are amended to eliminate "program or activity" as the focus and substitute instead the "recipient" of federal assistance. "Recipient" is defined in the bill as:

> any state or political subdivision thereof, or any instrumentality of a state or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such state, subdivision, instrumentality, agency, institution, organization, or entity), and
>
> any successor, assignee, or transferee of any such state, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit, to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.

This definition is the crux of the confusion over the real impact of S. 2568, for two reasons. First, the definition of "recipient" is so broad and all-encompassing as to overwhelm efforts to determine its precise effect. On the face of it, it would appear that there is some credence to the view that any part of any public or private enterprise could be subjected to civil rights regulations and enforcement procedures, however distant unaided activities may be from the activity receiving federal financial assistance. We wonder if such a sweeping approach was fully intended by the bill's sponsors. In any case, the point needs clarification.

Second, "federal financial assistance" is not defined at all in the bill. This is a critical point, for, tied as it is to direct or indirect extension of assistance, there may well be a heavy impact upon small firms that was neither intended nor foreseen by the bill's proponents.

To reiterate, our presence here today is motivated by a concern that there be a clear consensus as to what S. 2568 is intended to accomplish, and to recommend that before additional action is taken on this legislation, the language be drafted to clarify such intent. At the moment, we are unable to state precisely what the real impact would be on small business; we are concerned that there is potential for far-reaching impact which was never intended.

Senator GRASSLEY. Mr. McEwen.

Mr. MCEWEN. Yes.

Senator GRASSLEY. Is it possible that the information referral services provided by the U.S. Employment Service under the Wagner-Peyser Act, could be construed as indirect Federal assistance?

Mr. MCEWEN. Under the definition, as it is currently written, yes. It's our opinion that that could happen.

We are more, from our standpoint, we are much more concerned about the impact that this is going to have on trying to get the Government to become more efficient in some of its programs than it is right now. And I mentioned the Job Training and Partnership Act. One of the biggest criticisms of Federal job training programs, such as the CETA Program, was that it—we were training people and wasting funds and that type of operation. Now we have a Job Training and Partnership Act, which most of business has bought into. It is our very great concern that with the definition as written here for recipient, the small companies, where most of the job growth is, will be frightened away by the specter that they will undergo scrutiny by Federal agencies and so on, and will undo everything we've tried to do.

That's the type of concern that we have with the broad, ambiguous definitions as they are right now. And in answer to your question, yes, but many more programs that we're not even looking at right now could be affected.

Senator GRASSLEY. When you speak about the Job Partnership Training Act, then from your estimate of how this would impact upon it, it would be possible, given the provisions of this bill, as currently drafted, that an employer could be subject to compliance reviews and investigations by more than one agency?

Mr. MCEWEN. Yes. And that's exactly what the Government has been trying to avoid. If you look at the major compliance agencies that we have right now—let's look at OFCCP—prior to the creation of OFCCP as it is right now, there were 13 different—11 different Federal agencies doing compliance reviews for Federal contractors. And that was determined by the standard industrial classification of a particular industry. So if you were in the chemical business, you were being subjected to compliance reviews by the Department of Energy. If you were in some other area, you would have the Department of Defense.

That was duplicative. That was confusing. You had one company being reviewed by five or six different agencies, all of whom were operating on variations of a theme, and we had problems.

Now, it seems to me that the way the legislation is written, we could go right back to that because you could have, depending upon where the Federal aid was coming from, you would have different agencies with overlapping jurisdiction, and you may find that not only with that particular program or that particular institution, but your entire entity would be subjected to reviews on any of these—from any of these agencies, by accepting these Federal funds.

Senator GRASSLEY. To what extent would you say it's going to discourage participation in those education programs?

Mr. MCEWEN. Well, it all depends on how hungry the particular company is. It's going to discourage many small businesses from participating, if not cleaned up. But you're going to have some that will bite the bullet and do it anyway. So that's hard to predict.

What it does do, in my opinion, also, I thought we had a Paper Reduction Act—what was it formerly called?

VOICES. Paperwork Reduction Act.

Mr. MCEWEN. The Paper Reduction Act. We're going to create more paper by doing this than we ever thought about—than we've reduced so far, at the rate we're going.

Senator GRASSLEY. Well, then, we can form another Paper Reduction Commission.

Mr. MCEWEN. That's right.

Senator GRASSLEY. And have more political appointees to it, you know.

Mr. MCEWEN. Yes.

Senator GRASSLEY. This kind of breeds one solution for another.

Mr. Krebs, in your testimony, you expressed concern that S. 2568 would severely and adversely affect the existing relationships between all levels of Government; in other words, what we refer to as federalism. I would like to have you elaborate on how this is seen from the vantage point of your organization, the U.S. Chamber.

Mr. KREBS. Well, Mr. Chairman, this is a concern of ours, and it is a concern that has been raised by others, including the Department of Justice. The Chamber itself, as I mentioned in the testimony, is we have sent this legislation and some analysis of it to our labor relations committee and some experts, and we're trying to ascertain the scope.

And I frankly can't say one way or another, other than this is a concern, and we're trying to develop—we haven't had time to develop our position on that. So I am afraid I can't answer your question directly other than to say we feel that it may be a concern and one that certainly hasn't been addressed to date in any satisfactory manner.

Senator GRASSLEY. Well, would you like to give me your opinion if this bill would be enacted without amendments, in those portions of your testimony where you referred to whether pharmacists would be subject to regulation because they receive payments from medicare or medicaid, whether grocery stores would be subject to regulation because they accept food stamps, whether suppliers of durable medical equipment would be subject to regulation if they take assignment from customers of medicare reimbursement, and whether farmers who receive crop subsidies would be subject to regulation?

Mr. **Krebs**. Well, again, until we—I being a staff member of the Chamber—receive some direction from our board, I can't give you an opinion on behalf of the Chamber. As I indicate, we don't have a position on this. Our concern has been with the exceptionally rapid consideration and the fast legislative track that this is on.

Senator **Grassley**. It might even be difficult to answer if you had some time. Right.

Mr. **Krebs**. I think it probably would be. And we just don't feel that this legislation has received the consideration or analysis that it deserves.

Senator **Grassley**. Mr. Motley, you have been involved in fighting—your organization has been involved in fighting paperwork for a long period of time, so I suppose you would have some comments, as Mr. McEwen did, but if you want to comment on those, all right. But I would also like to suggest that another area where you have been very concerned in the area of employment, the Department of Labor currently contracts directly with several national organizations for the purpose of conducting training, technical assistance, and outreach programs to carry out that same Partnership Act that we've been talking about. These organizations include, like the National Displaced Homemakers Network, the Human Resources Development Institute of the AFL-CIO, Wider Opportunities for Women, and several others I am not going to bother to name.

Would the Job Training Partnership Act activities undertaken by these organizations be subject to an effects test under S. 2568?

Mr. **Motley**. Senator, before I answer that question, let me just say that I kind of put the cart before the horse before and summarized my statement for you. I do hope that you will accept my full statement, which is——

Senator **Grassley**. Yes, without question.

Mr. **Motley** [continuing]. Almost as brief for the record.

As far as your specific question is concerned, in our reading of the legislation, it is unclear to us, and I think that's what our major concern is. And anytime you're dealing with anybody in the small business sector, whether it's with the Immigration Reform bill or whether it's this bill or with any other type of Federal statute, any type of ambiguity which is out there will simply make them not participate.

Let me give you an example, and it's related to the jobs programs that Mr. McEwen mentioned before. We've had on the books for a number of years before the Finance Committee a targeted jobs tax credit. And we've maintained from the beginning of that, if your intention is to create jobs in this country, it is not by a targeted jobs tax credit, because jobs are being created in the small business sector and small business people aren't about to go out and qualify their people who walk across their doorstep to be recipients of that credit.

Any type of impediment that you stick in their way, they're simply going to say, "It's not worth it. I don't have the time to do this." So they're not going to participate in governmental programs. And that's going to be the end results.

And as far as that applies to the types of programs that you're asking in your question, I think the same result is going to be there. People are simply not going to take the chance of involving themselves in extensive litigation and extensive loss if they don't have to bother to do it.

Senator **Grassley**. Well, in your opinion—and this is a follow-on—do you think the Labor and Justice Departments would be obligated to run compliance reviews and file complaints if these organizations effectively discriminated even though there was no intent to do so?

Mr. **Motley**. Senator, I really don't feel qualified to answer that question. If I could, I would like to take it back to legal counsel and ask them if they would answer it after reading the language again.

Senator **Grassley**. Ok. We would like to have you do that.

Let me try another approach. Would this direct Federal assistance subject the membership of the organization as well as the enrollees to the same effects test? In other words, could the compliance review go beyond the federally sponsored activity?

Mr. **Motley**. We're fearful that it would. I couldn't answer it definitely again, because of the limited expertise of myself in this area. But we are very fearful that it would.

And I think that's what we're asking for clarification. Again, we are not opposed to the bill. We don't support it at this time. But there have been questions raised that concern us greatly, and we think they should be answered before this bill moves to the Senate floor.

Senator **Grassley**. That's all the questions. I have no further questions. But do any of you have any comment that you want to make on other questions that weren't addressed to each of you?

Mr. **McEwen**. There is one comment that I would like to make, and it's not one—I want to make sure that we go on record as saying that we are—we at NAM are in support of equal opportunity-type legislation. We are in support of the major intention of this bill. We don't believe, for instance, that—we don't believe voluntary compliance works, for instance. We believe if voluntary compliance worked, Moses would have come down with 10 guidelines, and he didn't do that.

But what we do believe is that whatever we're going to have to work under, it should be clear, it should be nonambiguous, and we shouldn't have to wait after the fact to determine what congressional intent was. We want it defined going into it. That's our concern.

Senator **Grassley**. Mr. Krebs.

Mr. **Krebs**. Mr. Chairman, if I could also just perhaps clarify the question you asked me concerning the State-Federal relationship. And again, although the Chamber has not taken a position yet on this bill, we don't support it or oppose it, we're concerned about the process and the way it's been handled, generally regarding a Federal-State relationship, we have very—we favor the leaving—keeping the Federal Government out of the State affairs, and we favor truly the Federal system and would want to see a minimization of Federal Government involvement at that level.

Now, that's a general policy that we have, and I would state that. But again, as to the specifics of this legislation, we're trying to develop our position. It appears to be exceptionally complex legislation, to my mind, and to the people that we've talked with. Yet people keep telling us how simple it is. Well, I just don't see this as a simple piece of legislation. And that's why we're really trying to look into it and determine its scope and ramifications and its effect on our members.

Thank you very much.

Senator **Grassley**. Well, once again thank you for the committee as a whole and myself for your kind attention. And hopefully, we will have the time to consider these issues that you're asking us to give time to be considered.

I am not sure the way the snowball rolls around here, even in the summertime. Sometimes it's difficult to guarantee that adequate consideration is given.

But thank you very much for that sharing your concerns.

[Pause.]

At this time we would like to have Dr. C. Emily Feistritzer; Mr. David Zwiebel; and it's my understanding that Philip J. Murren is going to take the place of William Ball, who was otherwise on our schedule.

Dr. Feistritzer is author of the Carnegie Foundation's "State-by-State Analysis of Teaching," and reported on that study at the hearings on excellence in education, conducted by this committee several months ago.

And I would like to say not only for myself but for Senator Hatch, your testimony was one of the highlights of those hearings.

And Mr. David Zwiebel is director of government affairs, Agudath Israel of America. Mr. Zwiebel will be speaking on behalf of the accredited Rabbinical and Talmudic Schools.

We are pleased to have you here today, Mr. Zwiebel, because most of the testimony of the witnesses of the other hearings have spoken principally of the problems that S. 2568 will impose upon the Christian schools, your testimony will help us better understand how other schools will be impacted by S. 2568.

And, Mr. Murren, it's my understanding that you're with us today not only as a representative of a large number of Christian schools but also as an expert in constitutional law, and specifically as it relates to educational issues. Am I right on that? You're here as Mr. Ball was, to represent Amish people in the landmark school case, as he did in that case, a case dealing with the right of parents to control the education of their children.

I would like to have you know that your prepared statement will be put into the record, and that we would ask you to summarize if you could.

STATEMENT OF C. EMILY FEISTRITZER, AUTHOR OF THE CARNEGIE FOUNDATION STATE-BY-STATE STUDY OF TEACHERS

Ms. **Feistritzer**. Thank you, Mr. Chairman. I will summarize my statement. Having listened to several people's testimony this afternoon, I will begin by saying that my position is slightly different. I represent a woman who, by many people's standards, has been quite successful, gone through the academic system and acquired degrees, including the Ph.D., and I have never had to sue anybody or file a complaint on the basis of discrimination.

My position regarding your new act, S. 2568, is based on a premise that societal changes dictate what laws we need in order to ensure equity in civil rights of its citizens. And I believe that this law, this proposed act, needs to be taken into—needs to be put into that context.

I am sure that if we were here having hearings— you were having hearings and listening to testimony on the Civil Rights Act of 1964—you would have a much different audience and a much different reaction than you have considering a Civil Rights Act of 1984.

I think that there is no question that title IX of the Education Amendments of 1972 made it much easier for women to embark on activities that had heretofore been engaged in predominantly by men. The irony of title IX is that it was introduced to get rid of discrimination against girls in school athletic programs. That was the specificity of that particular act.

I think it's ludicrous to think of a young woman being denied anything she chooses to do today. From 1960 to 1982, the percentage of college students who were women increased from 34 to 52 percent. There are more women enrolled in colleges of higher learning today than there are males.

Women received half of the bachelor's degrees and nearly a third of doctoral degrees in 1981, compared to 43 percent and 14 percent 10 years ago.

A third of law degrees granted today are granted to women, compared to only 7 percent 15 years ago. A third of the lawyers in this country now are women. That's a very high proportion compared to what we had when the Civil Rights Act of 1964 was passed.

The statistics—and they're in my written testimony—bear up for several other white-collar professionals. Women are no longer—are quickly no longer being a minority. Over one-fourth of solely owned small businesses are now run by women. The number of sole proprietorships run by women increased by 33 percent in just the last decade.

I feel that title IX facilitated, but did not create this situation. A changing society, spurred by high divorce rates and women heading households had as much to do with the changing role of women and women moving into academic institutions and into the workplace as did the law that was designed to protect them and make it easier for them to move into these areas.

I don't think that there is much chance that we will reverse in any area of civil rights in this country the progress that has been made for minorities and for women, for handicapped, and for the elderly. One need only look at history for evidence of irreversible societal changes that at the time they were initiated created wrenching conflict and now are passe and unquestioned; the Civil Rights Act of 1964 being such an example.

We are no longer an agrarian society where most of the men held jobs as farmers and all of the women were farmers' wives. We have a different society. We have a different societal structure.

And the job demands in the society are radically different than they were as recently as a generation ago.

I think it's of the highest order of concern in the United States that we preserve the civil rights of all citizens, but I fear the lack of clarity and specificity in the Civil Rights Act of 1984 will encourage endless litigation, which we do not need.

I think, in summary, that the laws that already exist to protect the civil rights of students, of all citizens in this country are enough. I think any citizen in the United States who wants to be protected by the U.S. Constitution has access to enough laws to protect him or herself. And I come down strongly on the side of not creating especially that seem to be clouded with as much ambiguity and uncertainty as the one before the Senate at this time.

Thank you very much.

[The prepared statement of Ms. Feistritzer follows:]

STATEMENT

OF

DR. C. EMILY FEISTRITZER

BEFORE

THE

COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

CONCERNING

S. 2568 - "CIVIL RIGHTS ACT OF 1984"

ON

JUNE 26, 1984

Mr. Chairman and members of the Committee, thank you for inviting me to testify on S. 2568, the "Civil Rights Act of 1984."

I have received academic credentials, including a Ph.D., from respected institutions of higher learning. I have taught in secondary schools and come through the ranks of academia from assistant professor to dean of a graduate school. I have directed federally-funded programs and headed national task forces. Five-and-a-half years ago I started my own publishing company here in Washington, D.C., which now publishes the newsletters, White House Weekly and Department of Education Weekly, among others. Last year I started the National Center for Education Information -- a one-stop source of information about education in this country. I am a businesswoman, an author, and an educator.

And I am a woman. I come from a long line of proud, hard-working Kentucky women who instilled in me an attitude of worth and accomplishment as a woman. It never occurred to me as a child that I couldn't do what I wanted to do because of my sex. It still doesn't.

I begin my remarks with this introduction because it deeply colors how I feel about laws designed to protect against discrimination.

There is no question that Title IX of the Education Amendments of 1972 made it easier for more women to embark on activities that had been engaged in predominantly by white males -- going to college, getting degrees, becoming white-collar professionals and blue-collar workers, playing competitive sports, etc.

It is truly amazing how far women have come since 1972 when Title IX was passed as part of the Education Amendments to the Civil Rights Act of 1964. The irony of Title IX is that it was introduced to get rid of discrimination against girls in school athletic programs.

It's almost ludicrous to think of a young woman being denied anything she chooses to do today. Women are rapidly moving into fields and positions of great influence. The number of women enrolled in institutions of higher education exceeded men for the first time in 1979. From 1960 to 1982, the percentage of college students who were males dropped from 66 percent to 48 percent, while the percentage of college enrollees who were women increased from 34 percent in 1960 to 52 percent in 1982.

Women received 50 percent of all master's degrees awarded in 1981 -- up from 40 percent a decade earlier. Women took half of the bachelor's degrees and nearly one-third of doctor's degrees conferred in 1981. The proportion of bachelor's and doctor's degrees which went to women ten years before was 43 percent and 14 percent respectively.

The most dramatic changes in education of women are occurring at the advanced degree levels. While men getting first-professional degrees (e.g., lawyers, doctors, dentists) still outnumber women nearly 3:1, the gap is closing. In 1971, the ratio was 15:1.

Women took 32 percent of all law degrees awarded in 1981, up from seven percent just ten years ago. While new law degrees overall more than doubled in the last decade -- from 17,421 to 36,331 --

new women lawyers increased ten-fold -- from 1,240 in 1971 to 11,768 in 1981.

New M.D.'s jumped 74 percent in the last decade -- from 8,919 to 15,505. While the number of new male doctors increased from 8,110 to 11,672 the number of new female M.D.'s more than quadrupled -- from 809 to 3,833.

Other white-collar professionals show similar trends. Fifteen times as many women receive engineering degrees as ten years ago. The number of women receiving degrees in dentistry jumped 2,000 percent. Women have gotten about 70 percent of education degrees for the last 30 years. The proportion remains about the same overall, with women taking a larger share of master's and doctor's degrees in education.

Over one-fourth of solely-owned small businesses are now run by women. The number of women sole proprietors rose 33 percent in just three years -- from 1.9 million in 1977 to 2.8 million in 1980.

Title IX facilitated but did not create this situation. A changing society spurred by high divorce rates and women heading households,* in addition to a growing number of women who wanted money, prestige and independence outside the home, stimulated the surge of women into academic institutions and the workplace. It's hard to measure how much the law helped. Sheer economic necessity and values of women prevailed.

** The proportion of female family householders with one or more children and no spouse present increased from 7.4 percent in 1960 to 18 percent in 1981 and continues to grow.*

But this is 1984. We continue to be a rapidly changing society. Rules and regulations that were necessary when this land was settled over 200 years ago as well as just 10 years ago may not be as necessary because what they were designed to bring about has been accomplished.

One need only look at history for evidence of irreversible societal changes that at the time they were initiated created wrenching conflict and now are passé and unquestioned: women's right to vote and blacks' use of public facilities to name only two.

We are no longer an agrarian society where most of the men in the U.S. were farmers and practically all of the women were farmer's wives. Jobs have changed for men as well as for women.

It is of the highest order of concern in the United States that we preserve the civil rights of all citizens, but I fear the lack of clarity and specificity in the "Civil Rights Act of 1984" will encourage endless litigation. The ambiguity surrounding who the "recipient" is must be clarified before the law is created and not left to the courts to decide. You have heard testimony from persons such as Assistant Attorney General Bradford Reynolds who are well-versed on laws concerning civil rights matters. I leave the technical debate to them.

However the condition of teaching in the United States is an area about which I know a great deal. I can envision, if S. 2568 is passed, a prospective female and/or handicapped and/or elderly teacher not getting a certificate suing on the basis of discrimination. The way certification of teachers is structured now with states issuing certificates, an entire state could have its federal funding cut off because a single individual called upon the "Civil Rights Act of 1984" in a discrimination suit.

By some interpretations, the same could apply to State Boards that control licensure of accountants, doctors, lawyers, nurses and numerous other professionals.

It appears that a student who doesn't get a loan in a multi-campus university could sue the institution on the basis of discrimination using S. 2568 and shut down all federal money going to that institute and its various branches.

There has to be a way to protect the civil rights of all citizens without penalizing the very structures that serve them.

I would like to think that the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, the Education Amendments of 1972, and the Rehabilitation Act of 1973 and other laws created to protect the civil rights of all citizens have accomplished much of what they were designed to and are sufficient to insure that no one is discriminated against in this nation.

Some proponents of the "Civil Rights Act of 1984" argue that it is needed to reverse legislatively the February 28 ruling of the Supreme Court on Grove City College v. Bell, 104S Ct. 1211 (1984). Often presented as evidence is the fact that the Department of Education withdrew its investigations of several educational institutions after the Grove City decision. What anybody has yet to report is *why* the Education Department stopped its investigations. I was at a press conference with Secretary of Education Terrel H. Bell shortly after the Grove City decision during which he made it very clear they needed time to look into the matter for its legal implications.

We don't need broad laws that require complicated litigation just to interpret. Much good has been accomplished by past civil rights laws. But much money, time, and frustration has been spent uselessly too. Employers have made decisions on the basis of intimidation, not competence of prospective employees. Incompetent people have been kept in jobs for the same reason. Our schools are filled with incompetent teachers because administrators fear the consequences of firing them. Our universities turn out staggering numbers of students who cannot read and write because professors are afraid of being sued if they fail a woman or minority.

Speaking from my own experience, I was hired a few years ago to be the director of a graduate school. It was a well known fact they needed a woman in their administrative ranks. The institution was in need of reorganization. Having acquired a reputation of being pretty no-nonsense in making decisions, it was clear to me they wanted a clean-up lady. Aware of all the laws protecting women and minorities I proceeded with extreme caution to conduct an evaluation of the faculty. I involved the right proportions of every population in the process and wound up getting rid of several faculty members. The same elaborate process was used in hiring new better qualified faculty. Blacks were hired for blacks and women for women. The institution was sued anyway for race and sex discrimination by a black woman. Years of time, money and energy by numerous people were invested in this case which was finally settled out of court.

We cannot afford to get bogged down by quotas and laws that protect the incompetent. The United States does a better job educating more people longer than any country in the world. We have equity in education, but we are slipping on excellence in education as numerous reports of the last year have testified. Hopefully, we can have both.

We don't need more laws protecting people against discrimination. There are already enough to protect anybody who wants to be safeguarded by the Constitution of the United States of America. If the intent of S. 2568 is to reverse the Supreme Court decision in the Grove City case, I hope it will limit itself to doing just that and not leave room for speculation as to its reach and application.

Mr Chairman, I appreciate the opportunity to present some of my views today. I will be happy to answer any questions.

Senator **Grassley**. Thank you.

Mr. Zwiebel—and I hope I pronounced your name correctly.

STATEMENT OF DAVID ZWIEBEL, DIRECTOR OF GOVERNMENT AFFAIRS, AGUDATH ISRAEL OF AMERICA, REPRESENTING RABBINICAL AND TALMUDIC SCHOOLS

Mr. **Zwiebel**. You were close. I answer to anything short of Smith, actually. But it's Zwiebel, is the way I pronounce it.

Senator **Grassley**. All right.

Mr. **Zwiebel**. The spelling also, by the way, is Z-w-i-e-b-e-l.

Senator **Grassley**. Not only does the chairman, but also the staff stand corrected.

Mr. **Zwiebel**. Thank you.

Senator **Grassley**. Go ahead.

Mr. **Zwiebel**. I am, Mr. Chairman, director of Government affairs of Agudath Israel of America. Agudath Israel is a 62-year-old national Orthodox Jewish organization with chapters in 30 States. It serves as an advocate for orthodox Jewish rights throughout the country. I greatly appreciate the opportunity you give me here today to comment on S. 2568. My statement will be brief.

One prefatory caveat. Agudath Israel's governing rabbinical policy board has not as yet taken a formal position on this bill. That is largely because the undue haste with which this matter is being moved along and the great breadth of the bill have not afforded our experts the opportunity to prepare a comprehensive analysis.

It is for that reason also that Dr. Bernard Frishman, chairman of the Association of Advanced Rabbinical and Talmudical Schools, sent a letter read into the record during Chairman Hatch's preliminary remarks earlier today. Please consider my statement, therefore, as an unofficial and only preliminary presentation of our community's views.

Any bill with so noble a title as the Civil Rights Act of 1984 commands special attention. The Orthodox Jewish community in this great Nation owes much to the constitutional, statutory and commonlaw protections that fall within the rubric of civil rights. The notion that persons in the United States should be treated as individuals, not as stereotyped members of identifiable racial, religious, or other groups has enabled our community, many of whom lost their grandparents, parents, siblings, and children a generation ago to a Nazi regime whose dictionary did not include the phrase "civil rights," to rebuild, grow, and even flourish.

It is precisely because we take this concept of civil rights so seriously that we are concerned about the potential implications of this bill. I use the word "potential implications" advisedly. It is at least conceivable that the other branches of Government will agree with the bill's supporters that this law is designed only—and I am quoting now a joint statement of Senators Kennedy and Packwood—"to eliminate the inappropriately restrictive interpretation imposed by the Grove City decision and reaffirm the legal safeguards available under these civil rights statutes."

In all frankness, when the bill was first introduced, I, too, thought that it was a circumscribed legislative endeavor, the ramifications of which were eminently clear. As the weeks went by, however, and as individuals like Assistant Attorney General Reynolds, Professor Fried, and Ricks College President Bruce Hafen, and publications like the Wall Street Journal and the Chicago Sun-Times exposed some of the ambiguities in the bill, it became apparent that this legislation carried with it the potential for great mischief.

Who now can be so sanguine that this bill will not be interpreted by courts and agencies as to extend the heavy hand of Government into areas where it does not belong?

The issue here is not, as some supporters of the bill have suggested, whether Congress should turn the clock back to the preantidiscrimination era. Of course it should not. The question, rather, is whether this particular bill will achieve its concedeably laudable objectives in a manner that is least likely to have unintended and unfortunate consequences. We do not have the answers to those questions, and from what I have heard here today, it appears that nobody else has the answers.

The bill's greatest weakness, I believe, is its incredibly broad definition of "recipient," which, of course, triggers all the other provisions of the statute. Others have already pointed out the many questions that would arise under the proposed legislation. And I need not reiterate or elaborate on those questions.

Permit me, however, to focus on one point. The Orthodox Jewish community is particularly concerned that this bill not have the effect of limiting parents' and students' educational options. In our view, the ultimate beneficiary of Federal assistance programs, whether extended directly to the student or funneled through some conduit, it is the student, not the school. Such funds, after all, are designed to give the students freedom of educational choice.

We would support an amendment to this bill's definition of recipient that reflects that simple fact. Such an amendment would have the effect of overturning the first portion of the *Grove City* decision, which in our view is the most pernicious aspect of the Supreme Court's holding.

In any event, it is overwhelmingly clear that, as formulated, S. 2568 raises very serious questions that have yet to be resolved. Those questions deserve painstakingly careful analysis, analysis that requires at a minimum more time. If nothing else, the lofty ideal of civil rights demands that legislation bearing its name be clear, unambiguous, and fair.

[The prepared statement of Mr. Zwiebel follows:]

TESTIMONY OF DAVID ZWIEBEL, DIRECTOR OF GOVERNMENT AFFAIRS,

AGUDATH ISRAEL OF AMERICA,

BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

CONCERNING S.2568, "THE CIVIL RIGHTS ACT OF 1984."

JUNE 26, 1984

Mr. Chairman and distinguished members of this Committee:

I am David Zwiebel, Director of Government Affairs of Agudath Israel of America. Agudath Israel is a 62 year-old national Orthodox Jewish organization, with chapters in 30 states, which serves as an advocate for Orthodox Jewish rights throughout the country. I greatly appreciate the opportunity you give me here today to comment on S.2568. My statement will be brief.

One prefatory caveat: Agudath Israel's governing Rabbinical policy board has not as yet taken a formal position on this bill, largely because the undue haste with which this matter is being moved along and the great breadth of the bill have not afforded our experts the opportunity to prepare a comprehensive analysis. It is for that reason that Dr. Bernard Fryshman, chairman of the Association of Advanced Rabbinical and Talmudic Schools, sent the letter read into the record during Chairman Hatch's preliminary remarks earlier today. Please consider my statement, therefore, as an unofficial and preliminary presentation of our community's views.

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It is precisely because we take the concept of civil rights so seriously that we are concerned about the potential implications of this bill. I use the word "potential" advisedly; it is at least conceivable that the other branches of government will agree with the bill's supporters that this law is designed only "to eliminate the inappropriately restrictive interpretation imposed by the Grove City decision and reaffirm the legal safeguards available under these civil rights statutes."* In all frankness, when the bill was first introduced, I too thought that it was a circumscribed legislative endeavor, the ramifications of which were eminently clear.

As the weeks went by, however, and as individuals like Assistant Attorney General Reynolds, Professor Fried and Ricks College President Hafen and publications like The Wall Street Journal and The Chicago Sun Times exposed some of the ambiguities in the bill, it became apparent that this legislation carried with it the potential for great mischief. Who can now be sanguine that this bill will not be interpreted by courts and agencies so as to extend the heavy hand of government into areas where it does not belong?

The issue here is not, as some supporters of the bill have suggested, whether Congress should "turn the clock back" to the pre anti-discrimination era. Of course it should not. The question, rather, is whether this particular bill will achieve its concededly laudable objectives in a manner that is least likely to have unintended and undesirable consequences. We do not have the answer, and from what I have heard here today, it appears that nobody else has the answer either.

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*Cong. Rec. S4585 (April 12, 1984) (statement of Senators Kennedy and Packwood).

The bill's greatest weakness, I believe, is its incredibly broad definition of "recipient" -- which, of course, triggers all the other provisions of the statutes. Others have already pointed out the many questions that would arise under the proposed legislation, and I need not reiterate or elaborate on those questions. Permit me, however, to focus on one point.

The Orthodox Jewish community is particularly concerned that this bill not have the effect of limiting parents' and students' educational options. In our view, the ultimate beneficiary of federal tuition assistance programs -- whether extended directly to the student or funneled through some conduit -- is the student, not the school. Such funds, after all, are designed to give the student freedom of educational choice. We would support an amendment to this bill's definition of "recipient" that reflects that simple fact. Such an amendment would have the effect of overturning the first portion of the Grove City decision, which we regard as the most pernicious aspect of the Supreme Court's holding.

In any event, it is overwhelmingly clear that, as forumulated, S. 2568 raises very serious questions that have yet to be resolved. Those questions deserve painstakingly careful analysis -- analysis that requires, at a minimum, more time. If nothing else, the lofty ideal of civil rights demands that legislation bearing its name be clear, unambiguous and fair.

Thank you very much.

Thank you very much.

Senator GRASSLEY. Thank you.

Mr. Murren.

STATEMENT OF PHILIP J. MURREN, ATTORNEY AT LAW, PARTNER IN BALL & SKELLY, HARRISBURG, PA, REPRESENTING ASSOCIATION OF CHRISTIAN SCHOOL INTERNATIONAL

Mr. MURREN. Thank you, Senator. I am Philip Murren, partner in the law firm of Ball & Skelly at Harrisburg, PA. I am presenting the testimony of my partner, William Bentley Ball, whose absence today is regretably necessary. Mr. Ball's background is as a constitutional attorney who has conducted first amendment litigation in the courts of 22 States. He and I have appeared in many such cases together and in many others before the Supreme Court.

We have also been asked to present our views by the Association of Christian Schools International, which speaks for more than 2,000 Evangelical Protestants' religious schools in the United States.

ACSI is strictly opposed to all forms of discrimination, even requiring its school administrators to sign a nondiscrimination pledge annually as a condition for membership.

Our testimony today is directed toward the effects of Senate bill S. 2568 on religious elementary and secondary schools. These are schools which the Supreme Court has held are entitled to first amendment religious liberty guarantees. Several first amendment concerns are brought into play by the present language of S. 2568. These concerns derive from the Supreme Court's previous directive that regulation of first amendment protected entities be characterized by narrow specificity and that agencies of Government refrain from afflicting burdensome regulations upon religious institutions absent the affirmative intention of the Congress clearly expressed.

The chief vices which we perceive in S. 2568 are its concepts of recipient, support, and assistance. We believe that these terms are ambiguous and are vague enough to pose serious constitutional difficulties for religious institutions.

We also respectfully suggest that the Congress not leave it to the courts to supply the meaning for these key terms. We believe that the Congress ought not set in motion a piece of legislation which is as unready as is this to be considered a safe vehicle for public use.

I will give but one example of a hypothetical situation in which this bill could cause difficulties for a church.

Calvary Christian School has 400 students, supported solely out of the freewill offerings of the congregation of the church. Since its founding in 1975, it has firmly resisted participating in any form of constitutionally allowable Federal, State, or local benefits. It has never had contacts with any Federal agency. The church and its school are tax-exempt under section 501(c)(3) of the Internal Revenue Code. One pupil receives assistance under a Federal aid program for the blind. Calvary Christian Church in 1980 became assignee of a $500 promissory note of Erie County in payment for land, the county being recipient of a Federal grant-in-aid.

Any of about six or seven different facts in that hypothetical could trigger the application of Senate S. 2568, and expose a church to burdensome Federal regulations, paperwork, investigations, and exposure to private lawsuits.

We have at the close of our written testimony included 12 separate questions inquiring into the scope of the applicability of the Civil Rights Act of 1984 to religious elementary and secondary schools. We urge that these questions be addressed on the record as part of the legislative history prior to any final action on this bill.

We believe that an additional matter raised by S. 2568 merits the attention of the Congress. Section 901(c) of title IX currently provides an exemption from coverage of title IX for educational institutions controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.

Our written testimony provides amplification of our concerns, but in simple terms, we believe that this religious exemption ought to be modified in two ways. No. 1, it should be clarified so that it indisputably includes religious educational institutions which are not under the formal control of a church or other separate religious entity but which are equally protected under the first amendment.

And second, we believe that the use of the term "religious tenet" standing alone affords insufficient protection for educational institutions which are founded in and operated out of religious concern.

A modification such as we propose in our written testimony would also bring this section more into line with the protections afforded religious liberty by the U.S. Supreme Court.

We thank you very much, Senator, and the full committee, for the opportunity to appear and testify on this most important piece of legislation.

[The prepared statement of Mr. Ball represented by Mr. Murren follows:

TESTIMONY OF
WILLIAM BENTLEY BALL
BEFORE SENATE LABOR COMMITTEE
WASHINGTON, D.C., JUNE 26, 1984
ON
SENATE BILL 2568 ("CIVIL RIGHTS ACT OF 1984")

I am William Bentley Ball, partner in the law firm of Ball & Skelly, Harrisburg, Pennsylvania. My particular background, relevant to this hearing, is as a constitutional attorney who has conducted First Amendment litigation in the courts of twenty-two states and has appeared in many such cases before the Supreme Court. I appreciate the Committee's invitation to hear me as such. I have also been asked to present my views here by the Association of Christian Schools International (ACSI) which speaks for more than 2,000 evangelical Protestant religious schools in the United States. ACSI is strictly opposed to all forms of discrimination, even requiring its school administrators to sign a nondiscrimination pledge annually as a condition for membership.

In testifying with respect to Senate Bill 2568, I address myself to the narrow area of its possible effects upon religious elementary and secondary schools. I respectfully urge certain amendments to this measure. Let me explain why.

The religious elementary and secondary schools of the nation render a great service to our country in terms of producing morally sound and well educated citizens. In a day of rising public school costs, they also save taxpayers very substantial per pupil educational expense. Unlike the public schools, however, they may not look to the public treasury for subsidy. ACSI schools, for example, not only depend exclusively on faithful congregations for their support; they, on principle, decline public support. They "make it on their own." But to "make it on their own", they must not be encumbered by extensive governmental regulation, provided that such regulation is not really needful for the protection of supreme public interests.

The Supreme Court of the United States has strongly affirmed that. It has recognized that religious schools are ministries[1], that these ministries may not be heavily entangled in governmental redtape. The Court has warned against governmental involvements with religious schools which require surveillance, inspections, audits, and like intrusions, which impose on such entities any "element of government evaluation and standards"[2], or call for "sustained and detailed relationships [between government and the schools] for enforcement of statutory or administrative standards."[3] The Supreme Court has stressed the fact that the First Amendment protects the religious liberty of the religious school.

That being so, legislatures must be wary of "across-the-board" legislation which, in haste to remedy some deemed social problem, lumps churches, faith communities, church organisms and ministries with industries, businesses, municipalities, secular nonprofits and other secular entities. The First Amendment protects religion because it is religion. It treats religion differently because religion is different.

Against that background, and with those words of caution, I now come to Senate Bill 2568.

I.

The threshold problem, and the pervasive problem with this legislation, so far as it pertains to the religious schools, is its concepts of "recipient" and "assistance". I shall try later in this testimony to again stress the fact that ACSI schools have the most constructive attitudes and practices toward age discrimination, race discrimination, discrimination against the handicapped, and sex discrimination. But that does not mean that these small self-supporting religious entities should be paved over with burdensome regulation, arbitrary and costly compliance requirements, and have thrust upon them the jurisdiction of governmental agencies, with inevitable surveillance, inspection, and other forms of constitutionally prohibited entanglements. Such entanglements, and the rights to private lawsuits accompanying them, will (a) do nothing to advance civil liberties, (b) burden religious civil rights, and (c) breed litigation costly to the public and confiscatory to religious communities whose financial resources are essentially funds committed to its stewardship by the faithful. Furthermore, in the case of religious institutions, there are unique problems to be dealt with when we come to consider the area of sexual differentiation. More of that anon, but the red flag I raise at this point, warns against loose drafting which would haphazardly (or deliberately) extend forms of federal jurisdiction over religious schools.

But that is what we face when we see the "recipient-assistance" provisions of Senate Bill 2568. It partakes of the Orwellian: a non-recipient is transformed into a recipient. In plainer terms, consider this hypothetical:

> Calvary Christian School has 400 students. It is supported solely out of the free-will offerings of the congregation of Calvary Christian Church. Since its founding in 1975, it has firmly resisted participating in any form of constitutionally allowable federal, state or local benefits. It has never had contacts with any federal agency. It is tax exempt under Section 501(c)(3) of the Internal Revenue Code. One pupil, John Smith, receives assistance under a federal aid program to the blind. Calvary Christian Church, 1980, became assignee of a $500. promissory note of Erie County in payment for land, the county being a recipient of a federal grant-in-aid.

Certainly Senate 2568 can be read as requiring the submission of Calvary Christian School to federal jurisdiction. By the miracle of 2568's arcane language, this small Christian school may as thoroughly under the federal thumb as a highway construction company operating under a $5 million dollar authorization.

Naturally, however, Calvary Christian School, when push comes to shove, is going to be conscious of that. It will inevitably claim that surely the Congress never intended so bizarre a result. And to defend itself from absorption, it will be forced to drain off those precious stewardship funds to defend its liberties in litigation. And then, disturbing questions about Congressional intent will be raised. Does Calvary's tax exempt status make it a recipient of Federal financial assistance? Does John Smith's aid make Calvary such a recipient? Or the Erie County note?

Members of the Committee: I respectfully suggest that these matters not be left to plague the courts. Above all, I urge that these matters not be left to plague our religious schools. You ought not set in motion a piece of legislation which is as unready as is this to be considered a safe vehicle for public use.

I could multiply, *ad infinitum*, examples of the bizarre application which the "recipient-assistance" concept of this bill can result in. And of course when one considers the language of Congress, it is simply and solely: "What did the Congress say?" By the commonest rule of construction, what it said is what it meant.

II.

Let me now consider Senate Bill 2568 as it relates to sex discrimination (Title IX). The bill affords the religious liberties of religious schools inadequate protection. As Senate Bill 2568 would amend Section 901(a) [20 U.S.C. §1681(a)], the reading thereof would be as follows:

> "No person in the United States shall, on the basis of sex, be excluded from participation, be denied benefits, or be subjected to discrimination by any education recipient of Federal financial assistance."

Senate Bill 2568 does not disturb the following exemptive language contained in Section 901(c) of Title IX (20 U.S.C. §1681(a)(3)):

> "(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;"

While this language is capable of constructions which would be sufficiently protective of religious organizations, it contains a concept which has bred disputes in the past.

The phrase, "institution which is controlled by a religious organization", can be read to exclude the institution which is itself a religious organization. A number of ACSI schools, for example, are not operated by a church or controlled by any other outside religious organization. Yet they are completely religious ministries and are entitled to the same protection which is accorded the educational institution which is controlled by a separate body.

The following amendatory language needs to be adopted:

> "(3) this section shall not apply to an educational institution which is an integral part of the religious mission of a church, or which, although not part of such mission, is pervasively religious in character, and for whom application of this subsection would conflict with religious tenets or convictions of such institution."

Case law makes it quite clear that the typical church-operated school is to be deemed a part of the church and protected as such from governmental intrusion.[4] The religious school which is in every respect similar to a church-operated school except for church affiliation should, of course, be given the same protection as the church-operated school.[5]

Under this language religious schools are exempt insofar as being free to follow religious doctrine relating to sexual differentiation. The words, "or convictions", are added to the present wording, "tenet", in order to avoid the situation seen in some religious liberty cases where established religious polity or practice may not be found in the formal language of one or another "tenet". In Wisconsin v. Yoder[6], a landmark religious liberty case decided by the Supreme Court in 1972, no "tenet" whatever was involved. Instead, at stake was the immemorial practice of a faith community respecting the lives of its young people. When NLRB attempted to impose its jurisdiction upon Catholic schools, no Catholic "tenet" was violated. Yet the religious liberties of Catholic schools were outrageously violated.[7]

At this point, it is important to comment on "sex discrimination" in the special context of religious institutions. Many religious bodies - Catholic, Protestant, Jewish - are theologically bound to observe certain forms of sexual differentiation as well as certain doctrines which relate to sex (e.g., respecting abortion). This is not the occasion to present the Committee a brief in defense of such observances. Suffice it to say that the observance of a religious tenet or conviction commanding sexual differentiation is a civil right.

III.

Other portions of Senate Bill 2568 relate to Title VI of the Civil Rights Act, to Section 504 of the Rehabilitation Act of 1973 and Section 302 of the Age Discrimination Act of 1975. ACSI applauds the laudable objectives of each of the acts, but must return to its very deep concern over the concepts of "recipient" and "federal assistance".

As to these, and as to the Title IX amendments in the bill, a large vista of questions opens up. These should be addressed now and not left to surface in controversy later on. If the bill is not sensibly and clearly amended forthwith, then it is respectfully suggested that, in ensuing colloquy in the Congress, certain questions vital to an understanding of this bill be asked and, on the record for the guidance of the government, the public and the courts, answered. ACSI, in view of the interests of its school population in the United States, has raised the following questions, and I urge that they be addressed "on the record" prior to the final action on the bill:

1. Will passage of the Civil Rights Act of 1984 require student racial quotas for Christian schools?

2. Will the new act require racial balancing of Christian school faculties, school boards and/or church boards?

3. Will the new act require all Christian schools with a total Black or Spanish/American or Asian/American or American Indian enrollment to enroll a government prescribed quota of Caucasion students?

4. We assume that state agencies such as state departments of education will be under the auspices of the Civil Rights Act of 1984. Are we to assume that Christian school teachers, certified by the state, will automatically qualify their Christian school as a "recipient" of government benefit and the school will therefore be under the regulatory auspices of the Civil Rights Act of 1984?

5. Will the local fire, police and health protection afforded Christian schools "qualify" them as "recipient" institutions of government aid and therefore subject them to civil rights regulation?

6. Will Christian schools regarded as "recipient" schools by Civil Rights authorities be forced to employ homosexual teachers if they apply for a teaching position?

7. Will Christian schools be regarded as "recipient" schools if they enroll one or more students whose parents receive state of federal grants in aid for their child's tuition?

8. Will Christian schools' tax exempt status "qualify" them as receiving a form of "federal assistance" and therefore subject them to requirements of the Civil Rights statutes?

9. Will use of religious admissions criteria (*e.g.*, that students be members of a particular church) which result in a low minority enrollment be prohibited?

10. Will private parties be permitted to sue religious schools to force institution of programs of bilingual instruction?

11. Will churches whose schools receive "assistance" be required to install ramps and other devices for the handicapped?

12. Will a school be brought within the coverage of this Act if a student or his parent receives Social Security payments or unemployment compensation payments?

FOOTNOTES

1. Lemon v. Kurtzman, 403 U.S. 602 (1971).

2. Walz v. Tax Commission, 397 U.S. 664, 674 (1970).

3. Lemon, supra, at 621.

4. Lemon v. Kurtzman, 403 U.S. 602 (1971); Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (7th Cir., 1977), aff'd. 440 U.S. 490 (1979).

5. Grace Brethren Church v. California, No. CV 79-73 MRP (C.D. Cal., April 3, 1981).

6. Wisconsin v. Yoder, 406 U.S. 205 (1972).

7. McCormick v. Hirsch, 460 F.Supp. 1337 (M.D.Pa. 1978).

Senator **Grassley**. Thank you very much.

I have just one or two questions for each of you, but if any of you have something to lend to the other's questions, you each would be invited to respond accordingly.

Dr. Feistritzer, your testimony is supported by much data. Would you please identify the sources, if that isn't too long of a list? And is this type of information generally available to anyone who wished to delve into the subject of teacher qualifications?

Ms. **Feistritzer**. The answer to the last question is, "No." The data that you have in my testimony referring to degrees that women have been getting compared to men and so on, most of that was gotten from the National Center for Education Statistics. I am somewhat of an education analyst and wrote a commentary shortly after the *Grove City* case, in which I included much of this material, my position being that we were too far down the road to reverse title IX and its effects. And I used much of the information in this testimony in that commentary.

So the hard data for all of that material on pages 2 and 3 can be gotten from the National Center for Education Statistics. I did the percentages, but the hard numbers are in that document called "The Condition of Education, 1982."

The information on the bottom of page 3, which I did not mention in my oral testimony on female family householders is from the Census Bureau.

Senator **Grassley**. All right. In your discussion of the gradual lowering of the qualifications of teachers, you suggest it's due, at least in part, to affirmative action programs. What do you see as a remedy?

Ms. **Feistritzer**. I am very much in favor of, and am doing a lot of research to support the position, that we really do need to tighten the requirements for teachers generally.

I am very much in favor of simplifying certification procedures, creating such a thing as a national exam, taking some of the control for teachers' tenure away from unions and away from the local school building level. That's another whole set of remedies, but I do think that the unions who represent teachers and the State departments of education that control certification of teachers have really gotten hung up in civil rights issues related to teachers, to the point of not firing incompetent people that are demonstrably incompetent.

Senator **Grassley**. Do you see any serious implications in S. 2568 for certifications of teachers by States or for other State licenser boards such as those which license nurses, doctors, and you know what all is licensed by States.

Ms. **Feistritzer**. Yes. Right. Yes, I understand your question better now. Yes, I do. I can envision a prospective teacher not getting certified in a State, for any reason, and suing on the basis of discrimination, using this law. And the way I read it, and in talking to lawyers—I am not well versed in the legal system, but I did do a lot of homework in getting ready for this testimony—the way I understand it and the way I have been advised is that it's quite conceivable that a whole State's funds could be shut down because a prospective person did not get certified in a State that held the right to certification. And that would include State boards of certification for accountants, lawyers, doctors, as well for classroom teachers.

Senator **Grassley**. OK.

David, are there significant numbers of veterans in your schools who receive educational assistance from the Veteran's Administration? And if so, what does their presence portend, as you see it?

Mr. **Zwiebel**. I must confess ignorance on that particular point. I can look into the question and——

Senator **Grassley**. You could submit in writing a response.

Mr. **Zwiebel**. Yes. Yes.

[Material supplied follows:]

AGUDATH ISRAEL
OF AMERICA הסתדרות אגודת ישראל באמריקה

OFFICE OF GOVERNMENT AFFAIRS

FIVE BEEKMAN STREET NEW YORK, N.Y. 10038
PHONE (212) 791-1800 CABLE AGUDOHNEWYORK

July 2, 1984

Mr. Howard Matthews
Office of Senator Orrin G. Hatch
135 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Matthews:

When I testified last Tuesday before the Senate Labor and Human Resources Committee regarding S. 2568, the "Civil Rights Act of 1984," Senator Grassley asked me whether a significant number of veterans attended the advanced Talmudical and Rabbinical schools in this counry, and if so, whether S. 2568 would have any effect on those schools. I confessed ignorance.

Having done some homework in the interim, I believe I can safely say that the number of veterans currently enrolled in the Talmudical and Rabbinical schools is not substantial. Even one such enrollment, however, apparently would make the school a "recipient' of G.I. educational benefits under S. 2568 and thus subject the entire insitution to the full brunt of governmental anti-discrimination regulations.

Please convey my thanks to Senator Hatch and the members of the Committee for providing me the opportunity to testify on this important matter. I enclose, for your record, a formal copy of my statement.

Sincerely,

David Zwiebel

David Zwiebel, Esq.
Director of Government Affairs

DZ:db
Enc.

cc: Senator Charles E. Grassley

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DIVISIONS National Youth Commission Zeirei Agudath Israel Bnos Agudath Israel Pirchei Agudath Israel Bachurei Agudath Israel/Agudist Women's Organization Neshei Agudath Israel/Camp Agudah/Camp Bnos/ The Jewish Observer/Dos Yiddishe Vort/Commission on Legislation and Civic Action/Commission on Israel/ Commission on Overseas Rescue and Relief/Commission on Social Services/Commission on Senior Citizens/ Project COPE (Career Opportunities and Preparation for Employment)/COPE Vocational Institute/ Commission on Latin American Jewry/National Commission on Jewish Ethnic Affairs (Judaiscope Southern Brooklyn Community Organization)/Commission on Branch Service and Development/ Commission on Adult Torah Education Daf Yomi/ Jewish Education Program (JEP)/Torah Education Network (Roshei Shiurei Torah)/Torah Action Program (TAP) /Project RISE (Russian Immigrant Services and Education) /Russian Immigrant Rescue Fund/Project YAD for Russian Jewry/Agudist Benevolent Society/Chevra Osek Chesed

Senator **Grassley**. Now speaking only of the provisions of title IX, would S. 2568, as written, require you to make some of your all-male seminaries or schools become coeducational?

Mr. **Zwiebel**. Well, it's of course difficult to answer that. I am an attorney, and the one thing I learned in my several years of practice in the private sector before I joined Agudath Israel was that it's very difficult to project how a court will come down on a question as complex, and particularly in a situation where there is, I think, a very confused bit of legislation as the one you raise.

I think that if there is at least the possibility that our schools—that our schools are all—are single-sex institutions and seminaries, would feel that—would feel the obligation either to stop admitting students who were receiving certain forms of governmental tuition assistance, or would be required to change the very nature of their educational program.

And as a matter of principle, I suspect that there are very few schools that would opt for the latter; that is, to change what they view as a matter of religious faith and conscience, the notion that there ought to be single-sex institutions and perhaps ordination only of single-sex—of only of males.

If it ultimately, of course, boiled down to the question of whether the school were to abandon its religious principles or to continue to be eligible for all of the Federal funding that they currently are eligible for through the students, I suspect that there is no real choice there and that they would opt for closing the schools even, if that's what it came down to.

Senator **Grassley**. Thank you very much.

Mr. Murren, if a private college receives no direct Federal assistance but has in attendance a single student receiving Federal scholarship assistance, would that college be subject to title IX coverage?

Mr. **Murren**. Well, my reading of *Grove City* would be that that would certainly be the case.

Senator **Grassley**. What if their only contact with the Federal Government was the fact that they had a student in attendance who received a guaranteed student loan?

Mr. **Murren**. Same response, Senator. Guaranteed student loans were mentioned in the *Grove City* case, and I think there was an opportunity to distinguish them there that the Supreme Court did not seize upon. And I think that's significant.

Senator **Grassley**. OK. Maybe along the same line, but let me ask it anyway, what if their only contact with the Federal Government was that they had a student in attendance who received GI benefits?

Mr. **Murren**. I would think that if you take the *Bob Jones University* case that was decided on the VA benefits question—and that, too, was cited with approval by the U.S. Supreme Court in *Grove City*—that it certainly would trigger title IX and all the other antidiscrimination provisions by receipt of VA benefits.

Senator **Grassley**. In all these instances that I just asked you questions about, three such, would such a college also be subject to coverage under title VI, section 504 and the Age Discrimination Act?

Mr. **Murren**. I would think so, Senator.

Senator **Grassley**. If this private college receives no direct Federal assistance but has in attendance a single student receiving food stamps assistance or welfare assistance, would that school be subject to coverage under title IX or the other statutes?

Mr. **Murren**. I think that's a danger in S. 2568. I realize that there is a statement in the joint explanation by Senators Kennedy and Packwood about eschewing the applicability where you have the rent paid by a landlord—or the rent paid to a landlord, or, I believe they do mention food stamps. But I don't believe that that is sufficient in and of itself to allow the colleges and other educational institutions to rest easy over the question.

May I add just one thing, Senator? One thing that we're very concerned about is that there is no definition of the term "assistance" in this—in this bill or in any other bill. There are two sections, section 602 of the Civil Rights Act of 1964; section 902 of title IX, which implied that assistance means loans, grants, and contracts. I don't believe that when this law is loosed in the area of private lawsuits, that that is guaranteed to stand up.

The other two laws contain no such language. That in itself may be significant. But we're concerned that things such as Social Security benefits to people, paid to people who patronize particular stores or institutions, or even so much as tax exemption afforded a school, would be the occasion to affix all of these burdensome regulations and exposure to lawsuits on a school.

Senator **Grassley**. Well, then, would it be fair for me to conclude from what you just said that there is no clear distinction in the text of the bill between these various forms of recipient aid?

Mr. **Murren**. There is certainly no distinction made.

Senator **Grassley**. OK.

Mr. **Murren**. No attempt at one.

Mr. **Zwiebel**. If I could expand upon that just for a moment. I think that the point that's made here is a very important one, and that is, it ties up with something that—a colloquy earlier today between Senator Kennedy and Messrs. Hooks and Days. It was suggested then that those charged with enforcing these statutes—and according to Professor Days, that meant the U.S. Justice Department—have not in the past and will not in the future abuse their regulatory powers.

I am not certain I agree that the Government does not occasionally act overzealously. But in any event, it is not only the U.S. Attorney General but private attorneys general, everybody who has standing to sue under these civil rights statutes.

And precisely because the persons with the authority to bring legal action are not necessarily the ones who have limited resources or would focus their efforts specifically on the types of things that supporters of the bill say that this legislation is aimed at, which is one of the reasons it causes us such great concern.

Senator **Grassley**. OK, back to you, Mr. Murren. If this private college—let us just assume now that it might be a Catholic-oriented institution—received $1 in Federal assistance for some secular program, like for instance, its physics department, would the nonsecular programs of that college be subject to the entire body of title IX rules and regulations?

Mr. MURREN. It would depend on the interpretation of the exemption for religious institutions contained in title IX, an exemption which I think is now drafted too narrowly. It would——

Senator GRASSLEY. Drafted too narrowly as it was originally drafted or——

Mr. MURREN. As it was originally——

Senator GRASSLEY [continuing]. Something from the college——

Mr. MURREN. As it was originally drafted.

Senator GRASSLEY. OK.

Mr. MURREN. I think that it does not—I think that the exemption from title IX for religious institutions is not coincident with the boundaries of first amendment protection. I think it's narrower than the boundaries of first amendment protection, and that it ought to be expanded.

Senator GRASSLEY. Well, now, again, on the supposition that this is a Catholic college, would this college, for example, have to abide by the abortion policies that are explicit in these rules and regulations?

Mr. MURREN. There are already title IX regulations which deal with abortion and what title IX covered institutions can and can't do with respect to the topic. And I would think that there would certainly be—it would certainly be logical to attempt to sue on the basis of those regulations.

What a court would do with the exemptive language in section 901(c) at this point I can't predict, because I don't think that the language is a sufficient guarantee of protection.

So I would say that that Catholic college certainly will undergo the burden of expense in defending against the litigation, with all the uncertainty that that involves, and also the possibility that if justice is not done and if the party plaintiff prevails, that their expense will be doubled or tripled because of the presence of the attorney's fees provision.

Senator GRASSLEY. Let me check with staff. I think that's all the questions I should be asking.

[Pause.]

Senator GRASSLEY. I assume that all you folks have been patient being around here all afternoon since 2. If you haven't, regardless of how long you've been here, I know it's been a long afternoon.

We thank each of you, everybody else who has been in the audience, now a few here. But I want to thank everybody for participation, and particularly in this analysis of this legislation. Hopefully, it will be given the care that you—and consideration—that you asked that it be given. That's sometimes difficult to accomplish, knowing how the political forces work in this town.

But I think it's incumbent upon based at least on your testimony, in which you asked us to be cautious. We have at least been warned so that, sometime in future years, if this legislation passes and it becomes the monster that certain people indicate it may be, that we at least were told in advance.

Thank you very much.

[Additional material supplied for the record follows:]

CHIC HECHT
NEVADA

COMMITTEES:
BANKING, HOUSING AND URBAN AFFAIRS
ENERGY AND NATURAL RESOURCES

United States Senate
WASHINGTON, D.C. 20510

STATEMENT OF SENATOR CHIC HECHT

on S. 2568

before the
Committee on Labor and Human Resources
United States Senate

June 26, 1984

Mr. Chairman, thank you for the opportunity to testify today on S. 2568, the "Civil Rights Act of 1984." I commend you and the Committee on Labor and Human Resources for holding this much needed hearing. In the two months since it was first introduced, the bill has prompted many questions regarding the extent to which it will expand coverage of the four federal statutes that it amends. Because of the serious consequences that the extension of federal coverage would have both on private entities and on state and local governments, I believe that it is necessary for the Senate to deliberate carefully on this proposal. This hearing and hearings by other Senate committees provide the appropriate opportunities to do so.

Today, I would like to make a few brief comments about S. 2568 and to indicate some of the changes that should be made in the bill before we give it our approval.

The first point that should be made is that S. 2568 is not, in the usual sense, a remedial bill. It does not represent a response by Congress to findings or even to allegations of existing discriminatory practices. It has been stated many times by both sponsors and critics of the bill that there was no issue of discrimination in the Grove City College v. Bell case; it should be added that nowhere in the testimony given thus far on S. 2568 have there been any charges of particular instances of discrimination that this bill is intended to address.

The conclusion that I draw from this is that the bill is far more a symbol than a carefully measured response to a proven problem. In my opinion, Congress -- and, for that matter, any legislative body -- does far better when it tailors its actions to specific problems than when it proclaims fine sounding principles. For this reason, I believe Congress should approach a statute of the magnitude of S. 2568 with extreme caution, determining both that the ends of the legislation are sound, and that the proposal represents an appropriate means to achieve those ends.

The supporters of this proposal would likely respond that the bill has in fact been carefully drafted to achieve a particular purpose. The bill, they say, is intended to reverse one part of the Supreme Court's holding in the recent case of *Grove City College v. Bell*. Specifically, S. 2568 is intended to reverse the holding that the anti-discrimination regulations of Title IX of the Education Amendments of 1972 apply only to the specific program or activity that receives direct or indirect federal assistance. Because of the very close statutory relationship between Title IX and Title VI of the 1964 Civil Rights Act, Section 504 of the 1973 Rehabilitation Act, and the 1975 Age Discrimination Act, the supporters of S. 2568 argue that the *Grove City College* decision is likely to affect these three latter statutes as well and that, therefore, all four Federal laws must be amended in order to achieve the goal of restoring Federal law to its status before the Supreme Court's decision.

I simply cannot accept either the premise or the logic of that argument, and this leads me to a few further observations. S. 2568 is not simply a reversal of the holding in the *Grove City College* case that defines the coverage of Title IX, nor does S. 2568 effectively return federal law to its pre-*Grove City* position. In the first place, the reversal of *Grove City* could be achieved far more simply in the manner proposed by two other bills presently pending in the Senate -- S. 2363 and S. 2412. To insure that the *Grove City* decision does not improperly alter the interpretation of the other three statutes, these two Senate bills could be amended to provide that the interpretations given to Title IX shall not be used as precedent for interpreting similar issues arising under the other laws.

In the second place, as the Assistant Attorney General and others have made quite clear, the *Grove City College decision* was not a radical change or a retreat from prior judicial interpretations of Title IX or, for that matter, the other three federal statutes. The Court's holding on program-specificity was indeed inconsistent with the interpretation given the statutes by some federal agencies in their enforcement regulations. But in my opinion the Court quite properly corrected that bureaucratic misinterpretation and reasserted the meaning of Title IX that Congress intended.

Instead of proceeding in a simple, direct manner, S. 2568 makes a major change in all four statutes by extending their scope to all "recipients" of direct and indirect federal assistance and federal support. This leads me to my third point: I do not believe that this bill is as vague or ambiguous as many of its critics maintain. The uncertainty surrounding this bill with respect to its practical consequences and its interpretation by the courts stems from the disparity between what the bill apparently means to one who reads it and what its supporters say it means.

For instance, to cite a much used example, is a locally owned food store a "recipient" under the proposed definition if it accepts federal assistance in the form of customers' food stamps or social security money? The sponsors say that S. 2568 does not change the current interpretation of the statutes that excludes such local businesses from coverage. But the statute says that a "recipient" is "any....private agency, institution, or organization, or other entity....to which Federal financial assistance is extended....through....a person." The store, a "private entity," receives food stamps or social security money, "Federal financial assistance," from its customers, "through a person." Coverage under S. 2568 seems clear. If the language does not represent the sponsors' intention, the sponsors should change the language.

Or take the problem of "pin-pointing" the sanction of fund termination. Existing law limits the fund termination power of a federal agency to the termination of funding for the particular program or activity which is found to be in noncompliance. The sponsors of S. 2568 indicate that the bill does not broaden the scope of the termination power. However, the language of S. 2568 permits the agency to terminate any "assistance which supports" the noncompliance. It seems rather clear to me that federal funds to an innocent program can easily "support" a noncomplying program and thus can be subject to termination. Again, if the sponsors do not intend this result, let them adopt more suitable statutory language.

Finally, Mr. Chairman, in addition to these two changes I want to suggest two further amendments to S. 2568 that I believe are necessary to make it an acceptable measure.

First, I happen to think that the supporters of this bill have focused their efforts on changing the wrong holding in the Grove City College decision. In addition to holding that the coverage of Title IX is "program-specific," the Supreme Court also held that even indirect federal assistance will trigger Title IX coverage. By bringing recipients of indirect aid under the federal statutes, S. 2568 and the Grove City decision draw into question a principle that is fundamental to the American way of life -- the distinction between the "public" sphere and the "private" sphere of conduct. I believe that it is essential to any sound piece of legislation in this area of law to limit coverage of the federal statutes to those who directly receive federal money or services which those recipients have a realistic option of refusing. Private businesses, farmers, churches, and schools are already subject to state laws and regulations guaranteeing civil rights. In the absence of any showing whatsoever that these private institutions are not upholding both the letter and spirit of those laws, it is simply wrong to subject them to the punitive expense and red tape of complying with a barrage of new federal regulations. In this as in all areas of federal law, our standards must be common sense and the principles upon which our nation is founded.

Second, the bill should clearly require agencies to find discriminatory "intent" as opposed to discriminatory "effects" in establishing a violation of the four statutes in question. The real evil that our civil rights legislation should confront is intentional discrimination -- individual acts, policies, or programs that deliberately favor one person over another on the basis of race, national origin, religion, sex, age, or handicap, and not on the basis of merit or some other reasonable ground. It is too often assumed that a violation of the federal agency regulations is the same as an act of intentional discrimination, but that is not true. Regulations proscribing acts that have only a discriminatory "effect" seldom give us clear notice of what precisely is being prohibited. These regulations lose any real meaning, and they encourage frivolous litigation and arbitrary enforcement.

If we in Congress decide to approve a statute of the magnitude of S. 2568, we should take every precaution possible to assure ourselves that the purposes of the legislation are sound and the means to achieve those purposes are effective and carefully drawn. In my opinion, S. 2568 at present fails both of these tests. I urge this committee to amend the bill into a form that all of us in the Senate and in the nation at large can freely support.

Thank you, Mr. Chairman.

STROM THURMOND
SOUTH CAROLINA

The President Pro Tempore
UNITED STATES SENATE

June 12, 1984

Senator Orrin Hatch
Chairman
Senate Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Orrin:

As you know, the proposed "Civil Rights Act of 1984", S. 2568, is currently pending before the Labor and Human Resources Committee, to which it was referred no doubt because the bill contains proposed amendments to the Education Act of 1972, the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975, within the jurisdiction of the Labor Committee. However, the bill also would amend Title VI of the Civil Rights Act of 1964, a statute clearly within the jurisdiction of the Judiciary Committee.

In my capacity as Chairman of the Judiciary Committee, I have a responsibility to assure that the committee and its members are afforded the opportunity to carefully review any legislation substantially impacting matters within the jurisdiction of the Committee. I, therefore, request your assistance, and that of Senator Kennedy as Ranking Member of the Labor Committee, in arranging for a sequential referral of S. 2568 to the Judiciary Committee for a period not exceeding 60 days upon its reporting from the Labor and Human Resources Committee.

Orrin, as Chairman of the Constitution Subcommittee in the Judiciary Committee, you have already displayed your recognition of the jurisdictional overlap of S. 2568 by conducting two hearings in that Subcommitee regarding the Grove City Case and the provisions of S. 2568. I commend your efforts in initiating the efforts to consider the implications of this legislation. I believe you will agree that the Judiciary Committee can make a valuable contribution to the analysis and preparation of this legislation, and, accordingly will appreciate your cooperation in having S. 2568 sequentially referred to the Committee for further consideration of issues within the Committee's jurisdiction.

With kindest personal regards and best wishes,

Sincerely,

Strom

Strom Thurmond

ST/rzq
Enclosure

CC: Senator Edward Kennedy

Orrin:
When it comes to the Judiciary committee, I expect to refer it to your Constitution Subcommittee.
S. T.

DON NICKLES
OKLAHOMA

United States Senate
WASHINGTON, D.C. 20510

COMMITTEES
ENERGY AND NATURAL RESOURCES
LABOR AND HUMAN RESOURCES
SMALL BUSINESS

June 12, 1984

The Honorable Orrin G. Hatch
Chairman, Labor and Human Resources Committee
SD-430
Washington, D.C. 20510

Dear Orrin:

Per followup of the letter I sent yesterday, I am even more convinced that a full Committee hearing is in order. As you know, Senator Hecht and Congressman Dan Coats have both requested to speak before our full Committee on S. 2568.

In addition, the American Farm Bureau Federation and the National Association of Manufacturers have also requested a full Committee hearing.

This legislation is much too significant and broad in its potential impact to move on without extensive discussion and debate on the language.

Your efforts in ensuring that our Committee has sufficient opportunity to review this bill are most appreciated.

Sincerely,

Don

DON NICKLES
U.S. SENATOR

DN:lc
Enclosures

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Congress of the United States
House of Representatives
Washington, D.C. 20515

SUBCOMMITTEES:
FOSSIL AND SYNTHETIC FUELS
ENERGY CONSERVATION AND PO

SELECT COMMITTEE ON
CHILDREN, YOUTH AND
FAMILIES

June 12, 1984

Hon. Orrin G. Hatch
U. S. Senate
Committee on Labor and
Human Resourses
SD-428
Washington, D. C. 20510

Dear Senator Hatch:

It is my understanding that the Civil Rights Act of 1984, S. 2568, is presently scheduled for markup in your Labor and Human Resources Committee.

I have been contacted by many constituents who are concerned about the implications of this legislation, especially its effect on churches, private schools and colleges. They believe the bill is so broad and all-encompassing that the federal government and courts could virtually bring every public and private activity under the jurisdiction of the several statutes that would be amended by S. 2568. My constituents are also unhappy with the method this important legislation is being reviewed by the respective congressional committees and feel a careful examination and debate are warranted before changing our civil rights laws.

Since I share all of these concerns and more, I would like the opportunity to testify before the Labor and Human Resources Committee on S. 2568. Apparently, the full committee has not yet conducted formal hearings, and I would urge you to consider doing so before reporting any bill to the Senate floor.

Sincerely,

Dan Coats
Member of Congress

DC:br:kp

NAM
National Association
of Manufacturers

Jan S. Amundson
General Counsel

June 11, 1984

The Honorable Don Nickles
Chairman
Subcommittee on Labor
Senate Hart Office Building
Room 713
Washington, DC 20510

Dear Chairman Nickles:

On Friday, June 8, 1984, you received a letter from the National Association of Manufacturers regarding the status of the Civil Rights Act of 1984, S. 2568. In this letter we indicated certain concerns we had regarding the potential breadth and effect of the legislation as drafted.

We understand that there are amendments to the bill under consideration. However, we believe that there should be an opportunity to fully discuss and consider any proposed changes to the legislation before the committee concludes consideration of legislation and any recommended amendments. To this end, we would suggest that the committee hold an additional day of hearings to allow for further comment and consideration of amendments that would result in the bill truly reflecting the original legislative intent. Should such hearings be held, the NAM would like to consider testifying and further clarify our views on S. 2568. Thank you for your consideration of this request.

Sincerely,

Jan S. Amundson

1776 F Street, N.W.
Washington, D.C. 20006
(202) 626-3700

American Farm Bureau Federation

WASHINGTON OFF
600 MARYLAND AVE., ,
SUITE 800
WASHINGTON, D.C. 20
AREA CODE 202 - 484-3

June 12, 1984

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate

Re: S. 2568 - Civil Rights Act of 1984

Dear Senator Hatch:

As we indicated in our letter to members of the Senate regarding the "Civil Rights Act of 1984," we feel that the Senate needs to carefully and thoroughly review the broad and ambigious language in that bill before proceeding to enactment.

We request that the full Labor and Human Resources Committee hold an additional day or two of hearings on this bill and that Farm Bureau be given an opportunity to present testimony.

We will appreciate your careful consideration of this request.

Sincerely,

John Datt

John C. Datt
Secretary and Director
Washington Office

JCD/lh

DON NICKLES
OKLAHOMA

United States Senate
WASHINGTON, D.C. 20510

COMMITTEES
ENERGY AND NATURAL RESOURCES
LABOR AND HUMAN RESOURCES
SMALL BUSINESS

June 11, 1984

The Honorable Orrin G. Hatch
Chairman, Labor and Human Resources Committee
SD-430
Washington, D.C. 20510

Dear Orrin:

As you know, the "Civil Rights Act of 1984," S. 2586, which is before our Committee has a number of potential problems in the vagueness of the language.

Since this legislation is extremely broad, I believe that it is important to establish a legislative history which defines what Congress intends to accomplish with this bill. Our Committee has had one hearing at the Subcommittee level on May 24. The Judiciary Committee, which currently has no jurisdiction over this bill has held two hearings that you chaired in the Constitution Subcommittee.

Since it is the Labor and Human Resource members who will vote on S. 2568, I think it is important that a full Committee hearing be held which gives all organizations who have concerns with this legislation the opportunity to testify. In our Subcommittee hearing, only one witness spoke with any criticisms of the legislation. Private university presidents, the American Farm Bureau Federation, Secretary Bell, William Bradford Reynolds, and the Civil Rights Commission are just a few of the important voices which need to be heard by our Committee on this legislation.

Your consideration of this request is sincerely appreciated.

Sincerely,

Don

DON NICKLES
U.S. Senator

DN:lc

215 Dean McGee Ave
Room 820

3003 Federal Bldg
333 W 4th

1916 Lake Road
[illegible]

SAM J. ERVIN, JR.
P. O. BOX 69
MORGANTON, NORTH CAROLINA 28655

AREA CODE 704
437-5532

May 24, 1984

'84 MAY 29 PM 12 4

Honorable Jesse Helms
United States Senator
Washington, D. C. 20510

Dear Jesse:

I have your letter of May 21. My views in respect to S. 2568 are in harmony with yours.

I have just completed revising for publication an autobiography entitled "Preserving The Constitution". One of the remarks I make in it describes with accuracy this proposed legislation.

The most serious threat to good government and freedom in America is not posed by evil-minded men and women. It is posed by legislative and judicial activists and other sincere persons of good intentions who are bent on remaking America without delay in the image of their own thinking. They lack faith in the capacity of people to be the masters of their own fates and the captains of their own souls, and insist on government assuming the task of controlling their thoughts and managing their lives. They forget that freedom is political power divided into small fragments, and insist a highly centralized federal government perform this task. They ignore the wise observation of a wise North Carolinian, Asa T. Spaulding, Sr., of Durham, that he who wishes to drink the cooling waters of the spring on the mountaintop must undergo the exertion of climbing the mountain, and insist on civil rights laws which bestow benefits on minorities on the basis of race rather than merit. Their impatience and zeal will not brook the delay of seeking amendments to the Constitution to legitimate their aims. In consequence, they do constitutional evil to accomplish without delay the ends they cherish.

If these sincere legislative and judicial activists and the confederates have their way, good government and freedom will vanish from our land.

In addition, this legislative proposal would visit the sin of the guilty upon all of the innocent.

Sincerely yours,

Sam

Sam J. Ervin, Jr.

SJE:mm

NATIONAL
ASSOCIATION
of
COUNTIES

440 First St. NW, Washington, DC 20001
202/393-6226

June 11, 1984

The Honorable Orrin Hatch
United States Senate
Labor and Human Resources Committee
SD-428 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

The National Association of Counties remains firmly committed to strong civil rights legislation. For this reason, we urge the committee to move swiftly and prudently in considering the Civil Rights Act of 1984 (S. 2568). The intent of the bill is to restore the original force and coverage of the civil rights laws in wake of the Supreme Court's decision in Grove City v. Bell.

While we support the intent of the bill, we are concerned that the proposed legislation may extend the force and coverage of the civil rights laws far beyond their original scope. Moreover, we are concerned that it may subject counties to unreasonable federal scrutiny and administrative burdens.

During a May 30 Senate Judiciary Subcommittee hearing on the bill, former Harvard Law professor Charles Fried testified that ..."The effect of Section 5 of S. 2568 would be to subject every single activity of state or local governments to the supervision of every federal agency which disburses any money to any part of such a state or local government entity." He further stated that ..."Congress would be subjecting every single state and local government activity to multiple reporting requirements and expanded anti-discrimination scrutiny." The fact that several other legal experts joined Mr. Fried in this interpretation of the bill is of grave concern to us.

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

ALBERT D. BOURLAND
VICE PRESIDENT
CONGRESSIONAL AND POLITICAL AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5600

June 12, 1984

The Honorable Don Nickles, Chairman
Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Don:

The Senate Committee on Labor and Human Resources presently is considering S. 2568, The Civil Rights Act of 1984. This bill raises serious and complex issues concerning its scope and potential impact that deserve careful analysis and reflection.

Accordingly, on behalf of the U.S. Chamber and its nearly 200,000 business members, I respectfully request that your Subcommittee hold hearings on S. 2568.

Thank you for your consideration of this request.

Sincerely,

Albert D. Bourland

cc: ✓Ron Docksai

NFIB® National Federation
of Independent Business

The Guardian of Small Business

June 12, 1984

Wilson S. Johnson
Chairman of the Board
and Director
National Federation
of Independent Business

John E. Sloan, Jr.
President, Chief Executive Officer
and Director
National Federation
of Independent Business

Frank M. Cruger
Vice President and Director
Indiana Manufacturers
Supply Co., Inc.
Indianapolis, Indiana

Bruno J. Mauer
Vice President and Director
Rucken Industrial Supply
Milwaukee, Wisconsin

Bruce G. Fielding, CPA
[illegible]
[illegible]
[illegible]

Lucy A. Fontenot
Assistant Secretary
National Federation
of Independent Business

Ted L. Kuchennier, CPA
Treasurer and
Chief Financial Officer
National Federation
of Independent Business

Ramon E. Billeaud
Director
J. B. Levert Land Co.
New Orleans, Louisiana

Richard S. Briggs
Director
Integrated Handling Systems
Menlo Park, California

Jerry J. Chicone, Jr.
Director
Chicone Groves Properties
Orlando, Florida

James S. Herr
Director
Herr's Potato Chips, Inc.
Nottingham, Pennsylvania

H. H. (Larry) Larson
Director
Columbia Paint Co.
Spokane, Washington

Gordon L. Stone
Director
Stonehouse [illegible] Inc.
Amador [illegible]

Dick Fisher, CAE
[illegible]
[illegible]
[illegible] Business

Honorable Orrin G. Hatch, Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the one-half-million small business owner-members of the National Federation of Independent Business (NFIB), I am writing to request that the Senate Labor Committee hold further hearings on S. 2568, the Civil Right Act of 1984. With the press of other business it has only just come to our attention that this legislation may have wide reaching affects on the nation's small businesses.

While I am not yet prepared to state any firm conclusions, enough questions have been raised concerning the intent and reach of S. 2568 that I believe America's entrepreneur's deserve a chance to thoroughly consider it. I, therefore, urge you to hold further hearings on the issue, with particular focus on its effects on the operating practices of the small business community.

Sincerely,

John

John J. Motley, III
Director of Federal Legislation

JJM:jz
531m

Federal Legislative Office
600 Maryland Avenue, SW
Washington, DC 20024
[illegible]

United States Department of Agriculture
Office of General Counsel
Washington, D.C. 20250

June 8, 1984

The Honorable Jesse Helms
Chairman
Committee on Agriculture, Nutrition,
and Forestry
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

On June 1, 1984, you wrote me requesting an analysis of the impact on agricultural programs of S. 2568, entitled the "Civil Rights Act of 1984." In particular, you asked whether S. 2568, if enacted, would have the effect of extending the reach of relevant Federal laws to "farmers and agribusinesses who receive Federal assistance." I believe S. 2568 might indeed extend the reach of applicable Federal laws regarding discrimination, as defined in Federal regulations and court decisions, on the ground of race, sex, handicap, and age ("civil rights laws"), to the American farmer in ways neither intended nor fully understood. The analysis below is brief because of this office's attempt to respond to your request quickly.

Under the Federal laws prohibiting discrimination on the grounds of race, age, or handicap, discrimination is currently prohibited in "any program or activity receiving Federal financial assistance." In the case of Title IX, which prohibits discrimination on the grounds of sex, discrimination is prohibited only in educational programs and activities. The Supreme Court held in Grove City College v. Bell, 104 S. Ct. 1211 (1984), that the current laws prohibit discrimination in a specific program or activity receiving Federal assistance and, when discrimination is found to have occurred, Federal funding may be terminated only with respect to the program or activity in which the discriminatory conduct was found to have occurred. S. 2568 would amend Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964 to prohibit discrimination by "recipients of federal financial assistance" rather than discrimination in "any program or activity receiving assistance," and to allow termination of any "assistance which supports" the discriminatory activity.

This Department is committed to vigorous enforcement of Federal civil rights laws. We are concerned, however, that if S. 2568 is enacted in its present form, it could so broaden the reach of the Federal laws regarding discrimination that it would make them applicable, in a manner that has never been contemplated, to individual farmers who participate in programs administered by this Department, and to recipients of Federal loans and grants.

Under the present statutory prohibitions against discrimination in "any program or activity receiving Federal financial assistance," the Department has treated the provision of agricultural price supports to producers as a program or activity. Thus, for example, cooperatives that assist the Department in the administration of the program are subject to the requirements of these civil rights laws and regulations regarding discrimination. The producers themselves, however, although arguably recipients of Federal financial assistance in the form of price supports loans, are not considered to be engaged in a program or activity receiving Federal financial assistance.

Under the proposed legislation, producers would be considered recipients of Federal financial assistance. As a result, it seems possible that price support loans could be denied them under certain circumstances. Presumably price support loans would be perceived as supporting all of the farming activities of the producer and therefore all of those activities would be subject to the requirements of the applicable laws regarding discrimination. This would add an expensive burden of enforcement to such USDA programs. The situation might be the same for producers receiving assistance in the form of premium subsidies under the Federal crop insurance programs.

I have discussed above the possible effect of S. 2568 on farm price support programs. We have not had time to analyze the bill's potential effects on other Department programs, including, for instance, (1) its effects on recipients (including individuals as well as business entities) of electric and telephone service provided by cooperatives which borrow from the Rural Electrification Administration; (2) its effects on recipients (individuals as well as business entities) of benefits from watershed and irrigation projects conducted or financed by the Soil Conservation Service; (3) additional potential effects on users (individuals as well as business entities) of National Forest lands; and (4) its potential effects on growers, handlers, packers, and others who are beneficiaries or recipients under Federal marketing order and other regulatory programs.

In nearly all of the programs administered by this Department, S. 2568 would appear to broaden substantially the applicability of the present Federal laws and regulations regarding discrimination, making them applicable to many more recipients, charging Federal agencies and recipients alike with additional and burdensome recordkeeping and compliance requirements, and extending those laws to new categories of recipients in a manner not heretofore contemplated by the Executive Branch or the Congress.

The language of S. 2568 is broad, vague, and little understood. The effects of the proposal on the American farmer and the people he does business with -- on the American farming industry as a whole -- can only be guessed at. Such a proposal should not be enacted without the fullest consideration. I therefore recommend that S. 2568 be thoroughly considered for its potential effects on thousands of beneficiaries of Federal assistance under programs administered by this Department -- as well as by dozens of other Federal agencies.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Daniel Oliver

Daniel Oliver
General Counsel

. CHIC HECHT
NEVADA

COMMITTEES:
BANKING, HOUSING AND URBAN AFFAIRS
ENERGY AND NATURAL RESOURCES

United States Senate
WASHINGTON, D.C. 20510

[illegible]

STATE OFFICES:

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308 NORTH CURRY STREET
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LAS VEGAS OFFICE:
300 LAS VEGAS BLVD., SOUTH
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RENO OFFICE:
300 BOOTH STREET
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June 12, 1984

The Honorable Orrin G. Hatch
SR-135 Russell Senate Office Building
Washington, D.C. 20510

Dear Orrin:

I understand that S. 2568, the Civil Rights Act of 1984, has been referred to the Labor and Human Resources Committee.

I have reviewed the legislation carefully, and have some serious reservations about the potential expansion of the Federal Government's power into private universities, state and local agencies and potentially private enterprise. I am concerned that this is not just a "simple overturn" of the Supreme Court's decision in the Grove City case.

Because of this, I would like the opportunity to testify before the Labor and Human Resources Committee on S. 2568. I understand that while the Education and Handicapped Subcommittees have held hearings, no full Committee hearing has been held.

Your consideration of this request is most appreciated.

Sincerely,

Chic

Chic Hecht

CH:gmt

ROBERT T. STAFFORD, VT., CHAIRMAN

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United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, D.C. 20510

June 12, 1984

Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

Dear Orrin:

It is my understanding that S. 2568, the Civil Rights Act of 1984, has been referred to the Labor and Human Resources Committee.

Having reviewed this legislation, I have found some major ambiguities in the language of the bill which raise significant questions concerning the bill's intended scope and application. The bill could create confusion in recipients, agencies, departments, and the courts, and may include impermissible interference with State prerogatives.

In addition, I have received the statements of the American Farm Bureau, the National Association of Manufacturers, the Association of Private Colleges and Universities, and other organizations who are concerned about this legislation. I am impressed by their legitimate questions about this "simple overturn" of the Supreme Court's decision in the Grove City case.

Because of these concerns as they relate to the entire U.S. Government, and specifically to the federal funding of our nation's highway system, I would ask that you postpone mark-up of this major legislation until the Subcommittee on Transportation of the Environment and Public Works Committee and the Department of Transportation can fully explore its potential impact.

Your consideration of this request is most appreciated.

Sincerely,

Steve Symms

Steve Symms
Chairman of the Subcommittee on Transportation

SS/rlj

UTAH HOSPITAL ASSOCIATION

Carolyn N. Eklund, Esq.
Vice President
Legal & Adminstrative Service

515 South Seventh East Suite 2-F
Salt Lake City, Utah 84102
364-1515

July 11, 1984

The Honorable Orrin G. Hatch
United States Senate
125 Russell Senate Office Building
Washington, D.C. 20510

RE: S.2568 - The Civil Rights Act of 1984

Dear Senator Hatch:

The Utah Hospital Association has been informed that S.2568 is scheduled for mark-up in your committee on Labor and Human Resources on July 25, 1984. This bill was introduced with the limited intention of overturning the Supreme Court's recent decision in Grove City College v. Bell 104 S.Ct. 1211 (1984), which held that discrimination provision of Title IV of the Education Amendments of 1972 was program specific. Three other statutes (Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and Title VI of the Civil Rights Act of 1964) contain the same language. S.2568 and its counterpart H.R. 5490 would amend all four statutes by replacing their references to "programs and activities receiving" federal financial assistance with the term "recipient". That term is very broadly designed and the enforcement scope of the statutes is expanded.

Utah hospitals are concerned that in focusing on the legislative repeal of Grove City, the drafters of the bill were confused over what is a covered entity. The difficulties in the bill can only be resolved if Congress clarifies what constitutes "federal financial assistance".

Utah hospitals are also concerned with the expanded enforcement thrust because the termination of funds beyond the discriminating program or activity threatens to contradict the fundamental purposes of both the civil rights laws and medical treatment itself. It can not (or at least should not) be the intent to extend penalties in such a way that the actual target becomes the patient who is the true recipient and beneficiary of federal assistance.

The Honorable Orrin G. Hatch
July 11, 1984
Page -2-

The definition of recipient is claimed to be derived from existing regulatory definitions, but it is a great deal broader. Under current regulations "recipients" are covered only in their funded "programs and activities" and not in their entireties, as is now proposed. Also indirect coverage is expanded immensely by the addition of a clause "including entities which receive support from the extension of federal financial assistance to any of their subunits", and deletion of the exemption for "ultimate beneficiaries".

Because the term "recipient" is central to the legislative repeal of Grove City and its program-specific limitation, the Utah Hospital Association suggests clarifying or limiting its definition. Further, S.2568 does not define "federal financial assistance". Thus if the bill were enacted, without amendment, we would be left with an overly broad category of affected "recipients" and entities which receive federal financial assistance. Law and reason suggest that hospitals that receive payment through Medicare or Medicaid (reimbursement for services rendered) should not be held to have received federal financial assistance Cook v. Budget Rent-A-Car Corp. 502 F. Supp. 494 (S.D.N.Y. 1980). Neither Medicare nor Medicaid pays more than a predetermined amount which was set at a rate to compensate an efficient hospital. Such payments are typically less than actual hospital costs. To the extent that assistance flows in any direction, it flows from hospitals to the government or to the Medicare of Medicaid beneficiaries.

The Utah Hospital Association on behalf of its member hospitals needs your help in amending the bill so that it does not have unintended overreaching results that are unfair to both the recipients or the hospitals.

Sincerely,

Carolyn N. Eklund

Carolyn N. Eklund
Vice President

CNE/jb

cc: Howard Matthews
Committee of Health and Human Resources

Nancy Taylor
Committee on Labor and Human Resouces

Steve Grossman, Administrative Assistant
Senator Orrin Hatch

STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION TO THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES RE: S. 2568 - CIVIL RIGHTS ACT OF 1984

June 26, 1984

Presented by C. H. Fields
Assistant Director, National Affairs Division

The American Farm Bureau Federation is the nation's largest general farm organization, with a current membership in excess of three million families who are members of 2,762 organized County Farm Bureaus in 48 states and Puerto Rico.

As a general rule, Farm Bureau has not become involved in civil rights legislation. However, we are concerned that the broad, vague, and all-encompassing language contained in S. 2568, particularly in the definition of "recipient" of federal assistance, may be an open invitation to the federal bureaucracy and the courts to bring virtually every public activity at all levels of government under the jurisdiction of the several statutes that would be amended by this legislation.

That is a serious enough threat to the integrity of state and local government. However, we are advised that the language in this bill may be interpreted to bring under the regulation of civil rights statutes a large portion of all private sector activity. Even individual farmers and ranchers who are recipients of various forms of federal assistance or who "receive support" from government programs may be affected.

We are mindful of the fact that some 700,000 farmers and ranchers are employers. Any regulation affecting employment practices could have an impact on agricultural employers with regard to sex, age or handicap requirements. Several thousand farmers throughout the country operate roadside marketing and other direct marketing to consumers. The structures used in these operations could be subject to access requirements in handicap regulations. The Department of Agriculture administers a number of programs involving federal assistance to farmers and ranchers. The broad language in this bill raises questions as to what impact anti-discrimination regulations would have on such benefits as loan guarantees, commodity loans and price support payments.

We have not had an opportunity to prepare our own in-depth legal analysis of the possible implications this bill might have on individual farming and ranching operations. However, we are impressed with the testimony of Daniel Oliver, general counsel of the Department of Agriculture, in testimony presented to the Senate Committee on Agriculture, Nutrition and Forestry:

> "...the statutes' focus on activities receiving Federal financial assistance, rather than on recipients of that assistance, is the basis of the Department's current and

long-standing view that these anti-discrimination laws are concerned, not with the activities of the ultimate beneficiaries of Federal financial assistance, but with the activities of the groups and individuals through which the government works to provide assistance to those ultimate beneficiaries.

"This understanding of many years is reflected in the regulations of the Department of Agriculture and of other agencies implementing the Federal anti-discrimination laws. Specifically, the regulation defining 'recipient' excludes from that definition the ultimate beneficiaries of a program or activity...

"It is important to note that this specific exclusion of ultimate beneficiaries is not grounded in any statutory definition of a recipient of Federal financial assistance or in any other specific statutory exclusion. It is grounded in the fact that the anti-discrimination statutes are directed at programs or activities receiving Federal financial assistance and therefore appear not to be directed at the ultimate beneficiaries of the assistance under those programs.

"...If this legislation is enacted, it appears doubtful that the current exclusion of ultimate beneficiaries from the definition of recipients of Federal financial assistance could be continued. Indeed, from the proposed bill's tracking of all the language of the present regulations defining a recipient, except that portion relating to the ultimate beneficiary, it seems entirely fair to infer a legislative intent to preclude continuation of the exemption of the ultimate beneficiary, and I certainly would not be surprised if a court made that inference...

"...some people say that (the) definition of a recipient of Federal financial assistance does not, could not, and was not intended to, include a farmer. I suggest, nevertheless, that that language could indeed include a farmer."

We have read the statements by the sponsor and several cosponsors made on the floor of the Senate on the introduction of this bill, including the assurances that it is not the intent of the sponsors "to break new ground," and that the bill is not intended to alter the current definition of recipient or federal financial assistance, nor that it is intended to alter substantive protections afforded by the laws that are to be amended.

In light of the testimony presented by Assistant Attorney General William Bradford Reynolds and the analysis of the bill prepared by the Chief Counsel of the Office of Management and Budget, plus a review by Mr. Oliver and other legal and legislative experts, we are not satisfied with those assurances.

We are well aware of the fact that any historical study of civil rights legislation leads to the conclusion that administrators and judges who interpret the language of such statutes tend to be creative and to interpret the language as broadly as possible.

We agree with Mr. Reynolds, Mr. Horowitz, Mr. Oliver, and others that the broad and ambiguous language used to define "recipient" leaves a number of unanswered questions as to how this language may affect the business community, including agricultural producers and marketers.

We are also cognizant of the more recent developments in the area of laws and regulations that seek to end discrimination on the basis of race, sex, age or handicap, in which the effect of actions or lack of action is used to determine whether discrimination has occurred, even in the absence of any intent to discriminate. This concept is currently spreading to the idea of "comparable worth," in which some would have the bureaucracy or the courts determine what a person should be paid for a given job, rather than the marketplace. The concept affirmative action or numerical quotas in employment also arises from attempts to assess discrimination based on effect or utilization. The idea of racial quotas is inimical to most people, including Farm Bureau members who believe in equal treatment under the law and equal opportunity, based solely on merit.

When these concerns are coupled with the fact that the civil rights statutes provide for the right of private action, the right of judges to award attorney fees and court costs to prevailing parties, this legislation could result in a situation in which farmers and ranchers, as well as others in the private sector, find themselves the target of thousands of lawsuits that result from the all-inclusive interpretation of the broad language contained in this legislation.

We are opposed to S. 2568 as presently written. It is clear that it goes far beyond the Grove City College decision of the Supreme Court. We understand that the sponsors of the bill seek to maintain the purpose and effectiveness of the present civil rights laws, and we do not disagree with that purpose.

If, in fact, the sponsors of this legislation are sincere in desiring to break no new ground, this Committee should narrow the scope of the language to achieve only what the sponsors say they seek to achieve--nothing less, nothing more.

It would be easy for the Congress to proceed with enactment of S. 2568 as introduced, particularly in a election year in which any legislation labeled as a civil rights bill is difficult to call into question. It is essential, however, that the Senate assume its responsibility to give this bill thorough study and that every effort be made to rewrite the language so as to narrow the scope and to make the intent more specific.

We have already gone too far in this country in concentrating power in the central government. In an era in which the Administration and the Senate is attempting to reverse that trend, along with efforts to reduce the burden of federal regulations on the private sector, it makes no sense to enact legislation, regardless of its label, that poses the threat of greatly increasing regulatory entanglement in the private sector and further centralizing authority in Washington.

We shall appreciate your careful consideration of our views.

TESTIMONY OF MR. ROY C. JONES, DIRECTOR OF LEGISLATIVE AFFAIRS, MORAL MAJORITY, INC. ON THE CIVIL RIGHTS ACT OF 1984 BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE, UNITED STATES SENATE, JUNE 26, 1984.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

MY NAME IS ROY JONES. I AM THE DIRECTOR OF LEGISLATIVE AFFAIRS FOR MORAL MAJORITY, INC., IN WASHINGTON, D.C. OUR ORGANIZATION WAS FOUNDED IN 1979 BY REV. JERRY FALWELL. TODAY WE REPRESENT OVER 80,000 MINISTERS, PRIESTS AND RABBIS, AS WELL AS MILLIONS OF MORAL MAJORITY MEMBERS NATIONWIDE.

MR. CHAIRMAN, IT IS WITH GREAT PLEASURE AND APPRECIATION THAT I EXPRESS OUR SUPPORT FOR THE CIVIL RIGHTS OF ALL AMERICANS. HOWEVER, I WOULD LIKE TO POINT OUT THAT "YOU CAN'T TELL A BOOK BY ITS COVER." AND YOU CAN'T ALWAYS TELL A LAW BY ITS TITLE.

MORAL MAJORITY YIELDS TO NONE IN ITS COMMITMENT TO THE PROPOSITION THAT THE CIVIL RIGHTS OF ALL MUST BE PROTECTED BY LAW AGAINST UNJUSTIFIED ABRIDGEMENT ON THE GROUNDS, AMONG OTHERS, OF RACE, RELIGION, SEX, AGE OR HANDICAP. HOWEVER, MERELY CALLING A BILL A "CIVIL RIGHTS ACT" WILL NOT NECESSARILY MAKE IT SO. THE PROPOSED CIVIL RIGHTS ACT OF 1984, ILLUSTRATES THIS POINT.

THE BILL[1] IS CLAIMED BY ITS SPONSORS TO BE A MODEST CORRECTIVE FOR ONE ASPECT OF THE SUPREME COURT'S DECISION IN GROVE CITY COLLEGE V. BELL.[2] "IT IS NOT THE INTENT OF THE SPONSORS," SAID SENATOR ROBERT DOLE, "TO BREAK NEW GROUND." IN FACT, HOWEVER, THE BILL WOULD OBLITERATE IN ITS COVERED AREAS THE CONSTITUTIONAL ALLOCATION OF POWERS BETWEEN THE FEDERAL GOVERNMENT, ON THE ONE HAND AND STATE AND LOCAL GOVERNMENTS ON THE OTHER. IT WOULD

FURTHER OBLITERATE THE CONSTITUTIONAL DISTINCTION BETWEEN THE GOVERNMENTAL AND PRIVATE SPHERES BY CONFERRING AN INSTANT AUTHORITY ON FEDERAL AGENCIES TO REGULATE THE PRACTICES OF VIRTUALLY ALL MAJOR PRIVATE ENTITIES IN THE SUBJECT AREA. THESE PROSPECTS ARE OMINOUS AND CAUSE ENOUGH IN THEMSELVES FOR THE REJECTION OF S. 2568.

THERE IS, HOWEVER, ANOTHER ASPECT OF THIS BILL WHICH IS OF EVEN MORE URGENT CONCERN TO ME AND THOSE WHOM I REPRESENT. THAT ASPECT IS THE DEVASTATING IMPACT THE BILL WOULD HAVE ON THE INDEPENDENCE OF CHURCH-RELATED AND OTHER PRIVATE SCHOOLS AND ON CHURCHES IN GENERAL.

S. 2568 ACCEPTS THE FIRST RULING OF THE SUPREME COURT IN GROVE CITY, THAT THE SCHOOL WAS A "RECIPIENT OF FEDERAL FINANCIAL ASSISTANCE," DESPITE THE FACT THAT "FEDERAL FUNDS ARE GRANTED TO GROVE CITY'S STUDENTS RATHER THAN DIRECTLY TO ONE OF THE COLLEGE'S EDUCATIONAL PROGRAMS."[3] IT PURPORTS, HOWEVER, TO OVERRULE THE SECOND RULING IN GROVE CITY, THAT THE "EDUCATION PROGRAM OR ACTIVITY" OF THE COLLEGE THAT WAS "RECEIVING" FEDERAL ASSISTANCE AND THAT THEREFORE WAS SUBJECT TO TITLE IX, WAS NOT THE COLLEGE AS A WHOLE BUT ONLY ITS FINANCIAL-AID PROGRAM.[4] THE RESULTANT OF THE BILL'S ACCEPTANCE OF THE FIRST RULING IN GROVE CITY AND ITS REJECTION OF THE SECOND CAN BE SEEN IN ITS NEW AND ALL-EMBRACING DEFINITION OF A "RECIPIENT" OF FEDERAL FINANCIAL ASSISTANCE:

> "(A) any State or political subdivision thereof, or any instrumentality of a State thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality,

> agency, institution, organization or entity), and "(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or any such subunit, to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."5

S. 2568 WOULD APPLY THIS EXPANSIVE DEFINITION OF RECIPIENT NOT ONLY TO TITLE IX, WHICH PROHIBITS SEX DISCRIMINATION IN FEDERALLY AIDED EDUCATION PROGRAMS, BUT ALSO TO THE AGE DISCRIMINATION ACT OF 1975; SECTION 504 OF THE REHABILITATION ACT OF 1973, AS AMENDED IN 1978, AND TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, WHICH STATUTES PROHIBIT DISCRIMINATION ON GROUNDS OF AGE, HANDICAP OR RACE IN ANY FEDERALLY AIDED PROGRAM. ALTHOUGH TITLE IX'S COVERAGE, EVEN IN BROAD FORM, APPLIES ONLY TO EDUCATIONAL ENTITIES OR SETTINGS, TITLE VI, SECTION 504 AND THE AGE DISCRIMINATION ACT COVER ALL FEDERALLY-ASSISTED ENTITIES AND PROGRAMS."[6] EVERY SUCH PROGRAM, THEREFORE, WOULD BE AFFECTED BY THE NEW DEFINITION CONTAINED IN S. 2568.

THE FOCUS OF MY REMARKS IS THE IMPACT OF S. 2568 ON EDUCATION. CONSIDER, FOR EXAMPLE, LIBERTY BAPTIST COLLEGE, THE STUDENTS OF WHICH RECEIVE FOUR STUDENT-RELATED TYPES OF FEDERAL AID:

1. BASIC EDUCATIONAL OPPORTUNITY GRANTS (PELL GRANTS)
2. GUARANTEED STUDENT LOANS
3. WORK-STUDY
4. SUPPLEMENTAL EDUCATION OPPORTUNITY GRANTS

IT WOULD SEEM CLEAR THAT, UNDER THE FIRST HOLDING OF GROVE CITY, EACH OF THESE STUDENT AID PROGRAMS WOULD CONSTITUTE AID TO LIBERTY BAPTIST COLLEGE. S. 2568 WOULD SUBJECT EVERY ASPECT

OF THE COLLEGE'S ACTIVITIES TO THE FEDERAL REGULATIONS APPLICABLE TO AGE, HANDICAP AND RACE AS WELL AS SEX DISCRIMINATION.

LIBERTY BAPTIST COLLEGE DOES NOT ENGAGE IN OR CONDONE DISCRIMINATION IN ANY OF THESE AREAS. HOWEVER, THE FEDERAL REGULATIONS IN THESE MATTERS ARE NOT CONCERNED MERELY WITH THE PREVENTION OF INTENTIONAL DISCRIMINATION. RATHER, THE COURTS HAVE UPHELD THE POWERS OF THE REGULATORS TO GO EVEN BEYOND THE STATUTORY LANGUAGE SO AS TO FORBID CONDUCT WHICH MERELY HAS A "DISCRIMINATORY EFFECT."[7] LIBERTY BAPTIST COLLEGE, UPON THE ENACTMENT OF S. 2568, WOULD BE SUBJECT NOT ONLY TO WHATEVER AFFIRMATIVE ACTION REQUIREMENTS MIGHT BE PROMULGATED BY THE AGENCIES IN EACH OF THESE AREAS, BUT ALSO TO THE INCREASED AND VARIED RECORD-KEEPING AND REPORTING REQUIREMENTS OF SEPARATE AGENCIES CHARGED WITH THE ENFORCEMENT OF FOUR DISTINCT STATUTES. AND ALL THIS WOULD OCCUR THROUGH THE MERE RECEIPT BY LIBERTY BAPTIST STUDENTS OF FEDERAL ASSISTANCE.

IF S. 2568 IS ENACTED, PRIVATE COLLEGES WILL HAVE TWO ALTERNATIVES:

1. REFUSE TO ADMIT STUDENTS WHO RECEIVE FEDERAL STUDENT AID, ASSUMING, OF COURSE, SUCH STUDENTS CAN BE RELIABLY IDENTIFIED IN ADVANCE;
2. ADMIT THOSE STUDENTS AND SUBUNIT TO THE FULL RANGE OF FEDERAL REGULATION ENVISIONED BY S. 2568, A COURSE WHICH WOULD SOUND THE DEATH KNELL OF THOSE SCHOOLS AS AUTHENTICALLY PRIVATE INSTITUTIONS.

THE PROBLEM HERE IS ESPECIALLY ACUTE FOR RELIGIOUS COLLEGES. TITLE IX PROVIDES AN EXEMPTION FOR "AN EDUCATIONAL INSTITUTION

WHICH IS CONTROLLED BY A RELIGIOUS ORGANIZATION IF THE APPLICATION OF [TITLE IX] WOULD NOT BE CONSISTENT WITH THE RELIGIOUS TENETS OF SUCH ORGANIZATION."[8] THE REGULATION IMPLEMENTING THIS PROVISION STATES THAT "[A]N EDUCATIONAL INSTITUTION WHICH WISHED TO CLAIM THE EXEMPTION...SHALL DO SO BY SUBMITTING IN WRITING TO THE ASSISTANT SECRETARY A STATEMENT BY THE HIGHEST RANKING OFFICIAL OF THE INSTITUTION, IDENTIFYING THE PROVISIONS OF THIS PART WHICH CONFLICT WITH A SPECIFIC TENET OF THE RELIGIOUS ORGANIZATION."[9]

APART FROM THE FACT THAT MANY, IF NOT MOST COLLEGES OF A RELIGIOUS ORIENTATION ARE NOT LEGALLY "CONTROLLED BY A RELIGIOUS ORGANIZATION," THIS REGULATION REQUIRES THAT THE COLLEGE ASSUME THE BURDEN OF PROVING THAT THE LAW OR REGULATION IN QUESTION VIOLATES A "SPECIFIC TENET OF THE RELIGIOUS ORGANIZATION." AND IT ENDOWS THE ASSISTANT SECRETARY OF EDUCATION WITH THE POWER TO PERFORM THE THEOLOGICAL TASK OF JUDGING THE MEANING OF RELIGIOUS DOCTRINE. THIS SITUATION HAS IMPORTANT IMPLICATIONS WITH RESPECT TO SUCH ISSUES AS THE INSTITUTION'S TREATMENT OF ACTIVE HOMOSEXUALS,[10] ITS POLICIES WITH RESPECT TO CAREER AND OTHER COUNSELLING OF TWO SEXES,[11] AND ITS TREATMENT OF ABORTION.[12]

UNDER S. 2568, IF A CHURCH-RELATED OR OTHER PRIVATE SCHOOL, OR EVEN A CHURCH ITSELF, RECEIVED ANY FEDERAL AID "DIRECTLY OR THROUGH ANOTHER ENTITY OR A PERSON," EVERY ACTIVITY OF THAT SCHOOL OR CHURCH OR OF ANY OF ITS SUBUNITS WOULD BE COVERED BY THE FOUR STATUTES AFFECTED. AS SENATOR ALAN CRANSTON EXPLAINED:

> Where the Federal financial assistance is provided to an entity itself, either directly from a Federal agency or through a third party, the whole entity and all of its component parts would be covered by the anti-

> discrimination ban and suit could be brought against the entity to enjoin discrimination in any of its components and to recover damages for injuries suffered by reason of discrimination in any component.[13]

AND IF ANY FEDERAL AID WERE PROVIDED DIRECTLY TO ONE OF THE SUBUNITS, RATHER THAN DIRECTLY TO THE EMTITY ITSELF, THE ENTITY AS A WHOLE (AND THEREFORE ALL OF ITS SUBUNITS) WOULD BE COVERED BY THE FOUR STATUTES IF THE ENTITY "RECEIVES SUPPORT" FROM THE SUBUNIT WHICH RECEIVES THE AID. MOREOVER, THE AGENCIES WOULD HAVE THE POWER TO TERMINATE ANY "ASSISTANCE WHICH SUPPORTS"[14] THE NONCOMPLIANCE BY THE ENTITY OR ANY SUBUNIT WITH THAT AGENCY'S REGULATIONS.

IN VIEW OF THE BROAD COOPERATION OF CHURCHES AND THE FEDERAL GOVERNMENT IN THE SOCIAL WELFARE FIELD, IT IS PLAIN TO SEE THAT MOST CHURCHES WOULD IMMEDIATELY QUALIFY AS "RECIPIENTS" UNDER S. 2568 AND THAT THEREFORE VIRTUALLY ALL THEIR ACTIVITIES WOULD HAVE TO ASSUME THE REGULATORY BURDEN OF COMPLYING WITH EACH OF THE FOUR STATUTES AND THEIR ACCOMPANYING REGULATIONS. SIMILAR CONCLUSIONS APPLY TO BUSINESS AND CHARITABLE CORPORATIONS, AND CIVIC ORGANIZATIONS SUCH AS THE MORAL MAJORITY.

IF A CHURCH RECEIVES A FEDERAL GRANT FOR A HOUSING ASSISTANCE PROGRAM, FOR EXAMPLE, THE SCHOOLS OPERATED BY THE CHURCH WOULD BE COVERED. IF ONE STUDENT IN ONE DEPARTMENT OF A UNIVERSITY USED A PELL GRANT, THE ENTIRE UNIVERSITY WOULD BE COVERED AS TO ALL ITS ACTIVITIES, EVEN THOSE WHICH ARE NON-EDUCATIONAL. THE UNIVERSITY COULD BE REQUIRED, FOR INSTANCE, TO INSTALL HANDICAP RAMPS ON ITS SEPARATELY OPERATED HOUSING DEVELOPMENT, EVEN IF NO HANDICAPPED PERSONS WANTED TO LIVE THERE. THE NET RESULT WOULD BE NOT AN INCREASE IN CIVIL RIGHTS BUT AN INCREASE

IN RENT.

ALSO, "THE BILL COULD BE CONSTRUED SO THAT FEDERAL FOOD STAMP PROGRAMS WOULD SUBJECT PARTICIPATING SUPERMARKETS AND LOCAL GROCERY STORES TO FEDERAL CIVIL RIGHTS COMPLIANCE REVIEWS AND COMPLAINT INVESTIGATIONS. PHARMACIES AND DRUG STORES THAT PARTICIPATE IN MEDICARE/MEDICAID PROGRAMS COULD ALSO BE "RECIPIENTS," AS COULD THE "TRANSFEREE" OF AN INDIVIDUALS SOCIAL SECURITY CHECK WHO, UPON ACCEPTANCE OF SUCH PAYMENT, WOULD HAVE (ALBEIT UNWITTINGLY) SIGNED AN OPEN INVITATION TO FEDERAL ENFORCERS TO ENTER AND INVESTIGATE."[15]

A MAJOR PROBLEM WITH S. 2568 IS ITS LACK OF PRECISION. IT FAILS TO DEFINE SOME OF ITS MOST IMPORTANT TERMS, SUCH AS "RECEIVES SUPPORT," "ENTITY," "SUBMIT," "ASSISTANCE WHICH SUPPORTS" AND OTHERS. WHILE IT IS THE INTENT OF THE SPONSORS THAT "TAX EXEMPTIONS AND DEDUCTIONS WOULD CONTINUE TO BE EXCLUDED FROM THE DEFINITION OF FEDERAL FINANCIAL ASSISTANCE,"[16] S. 2568 MUST BE READ IN THE CONTEXT OF THE HOLDINGS IN REGAN V. TAXATION WITH REPRESENTATION[17] AND BOB JONES UNIVERSITY V. U.S.,[18] THAT A TAX EXEMPTION IS A SUBSIDY. WHILE S. 2568 DOES NOT INCLUDE TAX EXEMPTIONS AND DEDUCTIONS AS SUBSIDIES, IT DOES NOT FORBID THEIR EXCLUSION. IN LIGHT OF THE SUPREME COURT'S APPARENT POSITION THAT REGULATIONS CAN EXPAND THE MEANING OF A STATUTE,[19] THE ENACTMENT OF S. 2568 WOULD PRESENT THE POSSIBILITY THAT FUTURE REGULATIONS, OR FURTHER STATUTORY AMENDMENT, COULD MAKE TAX-EXEMPT ORGANIZATIONS "RECIPIENTS" BY THE MERE FACT OF THEIR TAX-EXEMPT STATUS. IN ANY EVENT, AS S. 2568 NOW STANDS, SUCH A TAX-EXEMPT ORGANIZATION COULD BECOME A "RECIPIENT" IF A DONOR ENDORSED

HIS SOCIAL SECURITY CHECK TO IT.

FINALLY, IT IS IMPORTANT TO NOTE THAT ONE OF THE MOST BURDENSOME FEATURES OF S. 2568 IS ITS ALLOWANCE OF PRIVATE LITIGATION TO ENFORCE ALL FOUR STATUTES AGAINST THOSE DEFINED BY THE BILL AS RECIPIENTS OF FEDERAL AID. WHILE MONEY DAMAGES ARE GENERALLY NOT RECOVERABLE IN SUCH ACTIONS, ATTORNEYS' FEES AND COSTS ARE. THE POTENTIAL OBLIGATION OF PAYING THE PLAINTIFF'S ATTORNEYS' FEES AND COSTS AS WELL AS PAYING THEIR OWN COST OF DEFENDING SUCH LITIGATION IS A THREAT TO THE VERY SURVIVAL AS WELL AS THE INTEGRITY OF CHURCHES, RELIGIOUS SCHOOLS AND ALL PRIVATE INSTITUTIONS.

THE NET CONCLUSION FROM ALL THAT HAS BEEN SAID ABOUT S. 2568 IS THAT THE BILL IS ILL-CONCEIVED AND A PRODUCT OF UNDUE HASTE.

I HOPE THAT ITS EXPANSION OF THE CATEGORY OF RECIPIENTS OF FEDERAL AID AND ITS EXPANSION OF THE ENFORCEMENT POWERS OF FEDERAL AGENCIES WILL BE RECONSIDERED. AND I HOPE THAT SUCH RECONSIDERATION WILL INCLUDE AN EXAMINATION OF THE NEGLECTED FIRST HALF OF THE GROVE CITY DECISION - THE HOLDING THAT AID TO THE STUDENT IS AID TO THE SCHOOL. THAT HOLDING EFFECTIVELY BARS FROM FEDERAL PROGRAMS OF AID TO STUDENTS ALL THOSE YOUNG PEOPLE WHO WANT AN EDUCATION AT A TRULY INDEPENDENT PRIVATE COLLEGE WHICH OPERATES WITHOUT THE BURDENS AND CONTROLS THAT FOLLOW UPON THE RECEIPT OF FEDERAL AID. THOSE COLLEGES AND THEIR STUDENTS THEMSELVES HAVE CIVIL RIGHTS, ESPECIALLY OF FREEDOM OF CONSCIENCE, WHICH ARE WORTHY OF PROTECTION.

FOOTNOTES

1. S. 2568 AND H.R. 5490.

2. 104 S. CT. 1211 (1984)

3. 104 S. CT. AT 1220.

4. 104 S. CT. AT 1222.

5. SEC. 2(b)(2).

6. TESTIMONY OF CLARENCE M. PENDLETON, JR., CHAIRMAN OF U.S. COMMISSION ON CIVIL RIGHTS BEFORE HOUSE COMMITTEES ON JUDICIARY AND EDUCATION AND LABOR, MAY 16, 1984, P. 4.

7. SEE GUARDIANS ASS'N V. CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, 103 S. CT. 3221 (1983).

8. 20 U.S.C., SEC. 1681 (a)(3).

9. 34 C.F.R., SEC. 106.12(b).

10. SEE C.F.R. 106.40(a), "A RECIPIENT SHALL NOT APPLY ANY RULE CONCERNING A STUDENT'S ACTUAL OR POTENTIAL APRENTAL, FAMILY, OR MARITAL STATUS WHICH TREATS STUDENTS DIFFERENTLY ON THE BASIS OF SEX."

11. SEE C.F.R. 106.36.

12. SEE C.F.R. 106.40(b)(1), "A RECIPIENT SHALL NOT DISCRIMINATE AGAINST ANY STUDENT, OR EXCLUDE ANY STUDENT FROM ITS EDUCATIONAL PROGRAM OR ACTIVITY, INCLUDING ANY CLASS OR EXTRECURRICULAR ACTIVITY, ON THE BASIS OF SUCH STUDENT'S PREGNANCY, CHILDBIRTH, FALSE PREGNANCY, TERMINATION OF PREGNANCY OR RECOVERY THEREFROM, UNLESS THE STUDENT REQUESTS VOLUNTARILY TO PARTICIPATE IN A SEPARATE PORTION OF THE PROGRAM OR ACTIVITY OF THE RECIPIENT."

13. CONG. REC., APRIL 12, 1984, S4594.

14. S. 2568, SEC. 2(c)(2)(C).

15. TESTIMONY OF WILLIAM BRADFORD REYNOLDS, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, BEFORE THE HOUSE COMMITTEE ON EDUCATION AND LABOR, MAY 22, 1984; SEE ALSO PROF. CHESTER E. FINN, JR., CIVIL RIGHTS IN NEWSPEAK, WALL STREET JOURNAL, MAY 23, 1984.

16. STATEMENT OF SENATOR ROBERT DOLE(R-KANS.), CONGRESSIONAL RECORD, APRIL 12, 1984, S5490.

17. 103 S. CT. 1997(1983).

18. 103 S. CT. 2017(1983).

19. SEE GUARDIANS ASS'N V. CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, 103 S. CT. 3221 (1983).

NATIONAL ASSOCIATION *of* COUNTIES

440 First St. NW, Washington, DC 20001
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STATEMENT

FOR THE RECORD

ON BEHALF OF

THE NATIONAL ASSOCIATION OF COUNTIES

SUBMITTED TO THE

SENATE LABOR AND HUMAN RESOURCES COMMITTEE

ON THE

CIVIL RIGHTS ACT OF 1984

JUNE 26, 1984
WASHINGTON, D. C.

AMERICA'S COUNTIES
350 Years of Service to People

STATEMENT FOR THE RECORD ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES, SUBMITTED TO THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE ON THE CIVIL RIGHTS ACT OF 1984.

THE NATIONAL ASSOCIATION OF COUNTIES DOES NOT HAVE A FORMAL POSITION ON THIS BILL, BUT WE DO HAVE CONCERNS WITH ITS IMPACT THAT WE WOULD LIKE TO ADDRESS. THE ASSOCIATION HAS ALWAYS BEEN AND REMAINS A STRONG ADVOCATE FOR CIVIL RIGHTS LEGISLATION AND ENFORCEMENT. WE URGE YOU TO CONSTRUCT THIS BILL IN SUCH A WAY TO ENSURE REASONABLE INSTITUTION-WIDE COVERAGE OF THE CIVIL RIGHTS LAWS AFFECTED (I.E., TITLE IX OF THE EDUCATION ACT AMENDMENTS, TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, THE AGE DISCRIMINATION ACT, AND SECTION 504 OF THE REHABILITATION ACT) WITHOUT SUBJECTING UNITS OF LOCAL GOVERNMENTS TO UNNECESSARY OR DUPLICATED FEDERAL SCRUTINY AND UNWARRANTED OR UNFAIR CURATIVE SANCTIONS.

WE WOULD LIKE TO EXPRESS OUR APPRECIATION TO THE CHAIRMAN AND THE COMMITTEE FOR ASKING US TO PRESENT OUR VIEWS CONCERNING THE CIVIL RIGHTS ACT OF 1984, S. 2568. WE ARE AWARE THAT THIS BILL HAS BEEN THE SUBJECT OF HEARINGS IN THE HOUSE AND THE SENATE AND UNDERSTAND THAT IT'S MOTIVATION AND RATIONALE CLAMOR FOR SWIFT

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*NACo IS THE ONLY NATIONAL ORGANIZATION REPRESENTING COUNTY GOVERNMENT IN AMERICA. ITS MEMBERSHIP INCLUDES URBAN, SUBURBAN AND RURAL COUNTIES JOINED TOGETHER FOR THE COMMON PURPOSE OF STRENGTHENING COUNTY GOVERNMENT TO MEET THE NEEDS OF ALL AMERICANS. BY VIRTUE OF A COUNTY'S MEMBERSHIP, ALL ITS ELECTED AND APPOINTED OFFICIALS BECOME PARTICIPANTS IN AN ORGANIZATION DEDICATED TO THE FOLLOWING GOALS: IMPROVING COUNTY GOVERNMENT; ACTING AS A LIAISON BETWEEN THE NATION'S COUNTIES AND OTHER LEVELS OF GOVERNMENT; AND ACHIEVING THE PUBLIC UNDERSTANDING OF THE ROLE OF COUNTIES IN THE FEDERAL SYSTEM.

LEGISLATIVE ACTION TO BETTER ENSURE THE PROTECTION OF THE CIVIL RIGHTS OF CERTAIN INDIVIDUALS IN THE WAKE OF THE SUPREME COURT'S DECISION IN GROVE CITY COLLEGE V. BELL. WE ARE ALSO AWARE THAT THE SENATE HAS RECEIVED TESTIMONY AND STATEMENTS ADDRESSING THE COMPLEX PROCEDURAL CHANGES POSED BY THAT CASE AND BY THIS LEGISLATION. WE WILL NOT REHASH OR RESTATE THE COMPETENT AND THOROUGHLY RESEARCHED MATERIAL ALREADY PROVIDED THIS COMMITTEE. WE, HOWEVER, URGE THE COMMITTEE TO CONSIDER THE EFFECT THAT THIS LEGISLATION WILL HAVE ON UNITS OF LOCAL GOVERNMENT THROUGHOUT THE COUNTRY, PARTICULARLY THE COUNTIES THAT WE REPRESENT.

THE STATED PURPOSE OF S. 2568, TO MAKE "INSTITUTION-WIDE" THE ENFORCEMENT OF THE CIVIL RIGHTS LAWS TO INSTITUTIONS RECEIVING FEDERAL FUNDING, IS CLEAR AND WE SUPPORT IT. HOWEVER, WE BELIEVE THAT THIS BROADENED COVERAGE SHOULD NOT CREATE DUPLICATED FEDERAL OVERSIGHT OR HOLD UNITS OF LOCAL GOVERNMENT ACCOUNTABLE FOR ACTIONS OR EFFECTS BEYOND THEIR CONTROL. ADDITIONALLY, WE URGE THAT WHERE LOCAL GOVERNMENTS HAVE ACTED IN GOOD FAITH, RELIEF SHOULD BE AFFORDED ONLY PROSPECTIVELY.

THE FOUR ACTS AND THE BILL AS DRAFTED DO NOT TAKE INTO ACCOUNT THE PECULIAR BUDGETING PROCEDURES OF THE STATES AND LOCAL GOVERNMENTS. MANY FEDERAL FUNDS ARE AWARDED TO UNITS OF LOCAL GOVERNMENT FOR EXPENDITURE FOR SPECIFIC PROGRAMS NOT WITHIN THE DIRECT AUTHORITY AND CONTROL OF THE GOVERNING BODY OF THE COUNTY, CITY, OR TOWN. FOR INSTANCE, A SHERIFF'S DEPARTMENT, A BOARD OF PUBLIC WELFARE, A LIBRARY BOARD OF TRUSTEES, OR A SCHOOL BOARD MAY RECEIVE MONIES GIVEN TO A LOCAL GOVERNING BODY BY A FEDERAL AGENCY. THESE FUNDS MAY BE DIRECTED TO THE ULTIMATE RECIPIENT AGENCY BY FEDERAL OR

STATE LAW. IF THE LOCAL GOVERNING BODY HAS NO DIRECT LEGAL AUTHORITY OVER A SCHOOL BOARD OR SHERIFF'S DEPARTMENT, THEN ACCOUNTABILITY FOR ALLEGED DISCRIMINATION IN SUCH AGENCIES SHOULD BE LIMITED TO THE ELECTED OR APPOINTED OFFICIALS WHO HEAD AND DIRECT THOSE ACTIVITIES. IT IS UNREALISTIC AND ESSENTIALLY UNFAIR TO HOLD A UNIT OF LOCAL GOVERNMENT OR ITS OFFICIALS ACCOUNTABLE FOR ACTIONS OVER WHICH IT OR THEY HAVE NO LEGAL AUTHORITY TO CONTROL.

WE FEEL THAT RECIPIENTS, INCLUDING LOCAL GOVERNMENTS, WHICH HAVE KNOWINGLY AND INTENTIONALLY VIOLATED THE PROVISIONS OF THESE FOUR ACTS SHOULD BE HELD FINANCIALLY ACCOUNTABLE FOR SUCH VIOLATIONS. HOWEVER, WE BELIEVE WHERE ALLEGED VIOLATIONS ARE NOT BASED UPON INTENTIONAL DISCRIMINATION, BUT RATHER UPON THE EFFECTS OF POLICIES OR PROCEDURES NOT DISCRIMINATORY IN INTENT, THAT IT IS UNREALISTIC AND UNFAIR TO ORDER MONEY DAMAGES OR RETROACTIVE RELIEF.

THE COMMITTEE SHOULD CONSIDER STATUTORY CREATION OF A DEFENSE WHICH WOULD PERMIT COUNTIES AND OTHER RECIPIENTS TO AVOID RETROACTIVE RELIEF, SUCH AS MONEY DAMAGES, WHERE GOOD FAITH IS ASSERTED AND DEMONSTRATED TO SATISFACTION OF THE TRIER OF FACT. IN SUCH AN INSTANCE, RELIEF SHOULD BE LIMITED TO PROSPECTIVELY CURE THE DEMONSTRATED BUT INTENTIONAL VIOLATION OF THE CIVIL RIGHTS LAWS. THESE VIEWS WOULD IMPACT BOTH THE FEDERAL REVIEW PROCEDURES AND THE PRIVATE ACTION PROCEDURES CONTAINED IN THE FOUR ACTS.

FEDERAL REVIEW PROCEDURES

THE BILL AS AUTHORED PERMITS AND MAY REQUIRE SUBSTANTIAL OVERLAPPING OF FEDERAL ACTIVITY. FIRST, ANY FUNDING AGENCY HAS THE RESPONSIBILITY TO ENSURE COMPLIANCE WITHIN THE PROGRAM OR ACTIV-

ITY FUNDED. THIS IS UNQUESTIONABLY PROPER. HOWEVER, THESE AMENDMENTS WOULD ALSO PERMIT A FEDERAL FUNDING AGENCY TO INVESTIGATE, REVIEW, AND INSTITUTE SANCTIONS ACROSS THE BROAD PANOPLY OF ALL ACTIVITIES OF A RECIPIENT. WE FEEL THAT SUCH AUTHORITY CONFERRED UPON ALL FEDERAL FUNDING AGENCIES WILL RESULT IN DUPLICATED REPORTING REQUIREMENTS AND DUPLICATED FEDERAL REVIEW. IT CAN ALSO RESULT IN INCONSISTENT POSITIONS TAKEN BY FEDERAL AGENCIES AND WILL PUT LOCAL GOVERNMENTS IN THE POSITION OF RESPONDING TO DIFFERENT AGENCIES' REVIEW, SUGGESTIONS, AND DIFFERING REQUIREMENTS IN THE SAME AREA OF ACTIVITY. THIS PROPOSAL CAN ALSO RESULT IN FEDERAL AGENCIES REVIEWING PROGRAMS FAR BEYOND THEIR SUBJECT MATTER EXPERTISE -- BEYOND THEIR HISTORIC KNOWLEDGE AND AWARENESS OF THE STATUTORY PROCEDURES AND FUNCTIONS OF LOCAL GOVERNMENT PROGRAMS.

WE WOULD, THEREFORE, RECOMMEND THAT ANY INVESTIGATIVE OR OVERSIGHT ACTIVITIES BEYOND THE SPECIFIC PROGRAM OR ACTIVITY FUNDED BE REFERRED TO AND PERFORMED BY THE DEPARTMENT OF JUSTICE. WE ALSO RECOMMEND THAT JUSTICE HAVE THE AUTHORITY TO INITIATE AN EXPANDED INVESTIGATION AGAINST OTHER PROGRAMS OR ACTIVITIES OF THE RECIPIENT ONLY IF IT MAKES A PRELIMINARY DETERMINATION THAT:

A) THE ALLEGED VIOLATION IS THE RESULT OF KNOWING OR INTENTIONAL VIOLATION OF ONE OF THE FOUR ACTS; OR

B) THE ALLEGED VIOLATION IS THE RESULT OF A PATTERN AND PRACTICE OF CONDUCT TO WHICH THERE IS NO REASONABLE GOOD FAITH DEFENSE ASSERTABLE BY THE RECIPIENT; AND

C) THAT THE ALLEGED VIOLATION IN THE PROGRAM OR ACTIVITY IS WITHIN THE AUTHORITY AND CONTROL OF THE SAME GOVERN-

ING BODY WHICH HAS AUTHORITY AND CONTROL OVER THE OTHER PROGRAMS OR ACTIVITIES TO BE INVESTIGATED.

IN MAKING SUCH A PRELIMINARY DETERMINATION THE DEPARTMENT OF JUSTICE SHOULD GIVE A RECIPIENT REASONABLE NOTICE AND OPPORTUNITY TO BE HEARD ON THE QUESTION OF GOOD FAITH.

PRIVATE ACTIONS PROCEDURES

PRIVATE ACTIONS BROUGHT UNDER THE FOUR ACTS AMENDED BY THIS BILL SHOULD BE LIMITED TO THE PROGRAM OR ACTIVITY FOR WHICH THERE IS A SPECIFIC ALLEGATION OF DISCRIMINATION. MONEY DAMAGES OR RETROACTIVE INJUNCTIVE RELIEF SHOULD NOT BE DEMANDED UNLESS THE LAW SUIT ALLEGES A KNOWING OR INTENTIONAL VIOLATION OF ONE OF THE FOUR ACTS. SUCH A PRIVATE LAW SUIT SHOULD ONLY BE EXPANDED BEYOND THE PROGRAM OR ACTIVITY ALLEGED TO BE IN VIOLATION IF THE U.S. DISTRICT COURT HEARING THE ACTION FINDS, BY PRELIMINARY ORDER AFTER ADVERSARY HEARINGS AND FINDINGS OF FACT THAT:

A) PLAINTIFF HAS SHOWN A REASONABLE LIKELIHOOD OF PROVING INTENTIONAL OR KNOWING DISCRIMINATION; AND

B) THAT THE PROGRAMS OR ACTIVITIES OF THE RECIPIENT SOUGHT TO BE REVIEWED ARE WITHIN THE AUTHORITY AND CONTROL OF THE SAME GOVERNING BODY HAVING AUTHORITY AND CONTROL OVER THE PROGRAM OR ACTIVITY SPECIFICALLY ALLEGED TO BE IN VIOLATION.

WE URGE THAT GOOD FAITH ON THE PART OF A RECIPIENT BE AN AFFIRMATIVE DEFENSE TO MONEY DAMAGES OR TO RETROACTIVE INJUNCTIVE RELIEF. IF A COUNTY OR OTHER RECIPIENT CAN ESTABLISH ITS GOOD FAITH, RELIEF SHOULD BE LIMITED TO DECLARATORY RELIEF, PROSPECTIVE INJUNC-

TIVE RELIEF, AND COSTS. ADDITIONALLY, WE URGE THAT ANY MONEY DAMAGES AWARDED BE AGAINST THE RECIPIENT ONLY AND NOT ANY ELECTED OR APPOINTED OFFICIAL.

CONCLUSION

WITH THESE THREE CONCEPTS -- AVOIDANCE OF DUPLICATION; ACCOUNTABILITY ONLY FOR ACTS UNDER OUR CONTROL; A GOOD FAITH DEFENSE -- WE SUPPORT THE CONCEPT OF A BROADENED, INSTITUTION-WIDE, ENFORCEMENT OF TI~~TLE IX OF~~ THE EDUCATION ACT AMENDMENTS; TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, THE AGE DISCRIMINATION ACT, AND SECTION 504 OF THE REHABILITATION ACT.

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June 25, 1984

Mr. Howard Matthews
Staff Member
Committee on Labor and
Human Resources
Room 428
Dirksen Senate Office Building
Washington, D.C. 20510

VIA FEDERAL EXPRESS
BY-PASS MAIL ROOM

Re: The Civil Rights Act of 1984
(S. 2568 and H.R. 5490)

Dear Mr. Matthews:

I am writing on behalf of many concerned parties with respect to The Civil Rights Act of 1984, and would appreciate it if you would consider the following comments, and pass them along to Senator Hatch for his consideration. The Civil Rights Act of 1984 (the "Act") is currently under consideration in both the House of Representatives and the Senate. According to its proponents, this legislation substitutes "institution-wide" coverage under the existing Civil Rights statutes (Section 504 of the Rehabilitation Act of 1973, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972 and the Age Discrimination Act of 1975) for the "program-specific" limitation recently endorsed by the Supreme Court in Grove City College v. Bell, 104 S.Ct. 1211 (1984). In reality, the Act's broad definition of "recipient" and its characterization of aid, both direct and indirect, as "federal financial assistance" substantially increases governmental control and regulation of public and private entities. Congressional enactment of this legislation as proposed will adversely affect public and private hospitals and other health care providers.

Definition of "Recipient"

The 1984 Civil Rights Act defines "recipient" as:

> "A. any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and
>
> B. any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit, to which federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of federal financial assistance to any of its subunits."

The Act substitutes this broad, all-encompassing definition for the "program or activity" language found in the original Civil Rights statutes. Thus, the four (4) statutes would prohibit discrimination "by any recipient of" federal financial assistance, not just discrimination within a recipient's federally funded programs or activities. For example, all campuses of a multi-campus university would be "recipients," even if federal funds went to just one campus or to students enrolled at only one of the college campuses. Likewise, federal funds distributed to an undergraduate program would require compliance with the Civil Rights statutes by all graduate programs, even though federal financial assistance had not been received by any graduate level program.

This reasoning applies with equal force to hospitals and health care providers. Therefore, all affiliated hospitals would be "recipients" if one member hospital received federal funds or if a patient at one of the members hospitals received federal financial assistance, including Medicare or Medicaid. Furthermore, it is conceivable that a hospital which is directly or indirectly associated with a medical school might be deemed a "recipient" of federal financial assistance if one of the medical students received an educational grant or other indirect federal financial aid, even though the hospital did not receive federal financial assistance.

Once a hospital is deemed a "recipient," commercial property and activities not associated with medical care or treatment may be required to comply with applicable provisions under the four (4) Civil Rights statutes. This compliance and regulation can be compelled so long as the enterprise "receives support" from a hospital that is extended federal financial assistance, whether directly or indirectly.

The "recipient" definition has other inherent ambiguities as well. For example, a larger "entity" (not defined) becomes a "recipient" of federal financial assistance if one of its "subunits" (not defined) receives federal funds. Thus, if a State university receives federal funds, either directly or indirectly, as a "subunit," all other State departments and agencies are subject to regulation under the Civil Rights Acts because the State "receives support" from the State university system. This "trickle up" theory of coverage will permit Federal agencies to investigate claims of discrimination against a nonfunded component of State government if some other component is funded. Conversely, if the large "entity" receives federal financial assistance, all subunits are swept within the coverage provisions whether funded or not and whether or not they "receive support" from the funding. Thus, a federal grant to a State for educational purposes brings all of the State's political subdivisions under the civil rights oversight responsibilities of the Federal Government.

Finally, all successors, assignees or transferees of a "recipient" become recipients in their own right. Thus, federal food stamp programs would subject supermarkets to federal civil rights compliance reviews and complaint investigations. Hospitals, pharmacies and drug stores that participate in the Medicare/Medicaid programs would also be "recipients" required to comply with all aspects of the Civil Rights Acts.

Proposed Amendments

In an attempt to alleviate the negative impact that institution-wide coverage under the Civil Rights Acts will have on hospitals, we have drafted remedial amendments with a view toward excluding certain monies, such as Medicare and Medicaid, from being treated as "federal financial assistance." (See Exhibit "A")

The basis for this position is reasonable and logical. When Congress appropriates funds, earmarks them for a particular purpose and grants them to an agency or other party to administer to achieve that purpose, that is, a "program or activity" receiving federal financial assistance. Congress intends that the grantee use the funds in a particular way to achieve a designated purpose in a non-discriminatory manner. This is not the case with funds paid as reimbursement under Medicare and Medicaid. The health care provider, which may be a hospital, physician, or drugstore, serves a patient and a designated amount is paid as at least partial reimbursement. Federal and governmental interest ends at this point. Congress does not care what happens to the money subsequently. The statutory purpose has been achieved when the patient is treated.

The legislative history of the key Civil Rights Acts indicate that a party is not covered by such statutes merely because a dollar paid by the Federal Govenment finds its way to that party's pockets. Congress did not intend to make the Civil Rights Acts all encompassing and all pervasive. Rather, Congress intended to prevent those who administer the funds, activities and programs--and benefit--from discriminating. Congress did not intend to bring under the Civil Rights Act every person and entity that incidentally receives a dollar from the program or activity. Applying this premise to a health care institution, it can be seen that health care providers were not intended to be covered by the Civil Rights Acts merely because they provide health or hospital services to patients whose bills are paid by Medicare and Medicaid. The hospital does not decide who does or does not qualify for Medicare or Medicaid, what services are or are not covered, or how much is paid on behalf of the beneficiaries. The hospital provides a service--health care--to patients for whom the State or Federal Government is willing to pay, and that is all. The hospital does not operate a program or activity that receives "federal financial assistance." Such payments do not constitute assistance to the hospital, nor were they intended to do so. The purpose of Medicare and Medicaid is to provide assistance to the patients and clients of health care providers. The hospital is merely reimbursed for costs incurred in delivering services purchased by the patient, and paid for in part by the Government. These payments do not benefit, assist, or aid any activity of the hospital.

Our immediate concerns pertain to members of the health care community who may fall victim to the indirect aid theory vis-a-vis their treatment of Medicare and Medicaid patients. However, the arguments I have articulated certainly apply across the board to many other institutions who, on very tenuous bases, may be subject to unnecessary federal regulations. I respectfully request that you review our comments and pass them along to Mr. Hatch for consideration.

If you have any questions, please feel free to call me personally or Mr. David Dean or Ms. Tonya Johannsen at (214) 742-1700. Thank you for your time and consideration on this matter.

Very truly yours,

Stephen P. Wilkes

SPW:dsn
Enclosures
cc: David A. Dean, Esq. (of the Firm)
Tonya L. Johannsen, Esq. (of the Firm)

AMENDMENT NO. 1:

A limitation could be inserted under the definition of the term "Recipient" to the following effect:

> "Provided, however, that reimbursement or payment for goods or services previously rendered shall not be deemed Federal financial assistance or support".

AMENDMENT NO. 2:

Alternatively, the limitation could read that "Provided, however, that payments in discharge of debt obligations or a reimbursement for goods or services shall not be deemed Federal financial assistance or support".

AMENDMENT NO. 3:

Further, the Act, as proposed, provides that a "Recipient" means any political entity, public or private institution, or other entity, and successors, assignees, or transferees thereof, to which "...Federal financial assistance is extended (directly or through another entity or a person), or which receives support from..." (Emphasis Added). I would prpose that the words "or a person" be deleted, as this clearly constitutes in our minds situations where the person himself is the recipient, not the entity which has an indirect link with such person. As discussed above, such "person" is the person to whom Federal aid was contemplated under the enabling statute that authorized the payment of money.

AMENDMENT NO. 4:

A more specific approach, designed exclusively for a hospital setting, would be to specifically exclude Medicare and Medicaid payments. An amendment could be drafted to read "Nothing in this title shall be construed to make its provisions applicable to the operation or conduct of any or all of the services or activities of a health care institution, including but not limited to hospitals, physicians' offices, and pharmacies, if a patient or client of said service provider receives, and pays, for such health care service, with funds designated as Medicare or Medicaid payments.

Please call David Dean, Tonya Johannsen or I when you have received this material, so that we may offer any additional comments that you may deem necessary to your consideration. I look forward to hearing from you, and working with you on this issue. Needless to say, we all appreciate the fact that your office is willing to provide a forum for our concerns.

BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS
200 MARYLAND AVENUE, N.E., WASHINGTON, D.C. 20002-5797 202/544-4226

JAMES M. DUNN
EXECUTIVE DIRECTOR

STATEMENT OF THE
BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

on

S. 2568 -- The Civil Rights Act of 1984

to the

Committee on Labor and Human Resources
United States Senate

June 26, 1984

The Baptist Joint Committee on Public Affairs is composed of representatives from eight national cooperating Baptist conventions and conferences in the United States. They are: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These groups have a current membership of nearly 30 million.

Through a concerted witness in public affairs, the Baptist Joint Committee seeks to give corporate and visible expression to the voluntariness of religious faith, the free exercise of religion, the interdependence of religious liberty with all human rights, and the relevance of Christian concerns to the life of the nation. Because of the congregational autonomy of individual

Baptist churches, we do not purport to speak for all Baptists.

All of the Baptist groups which compose the Joint Committee have adopted formal statements in opposition to discrimination and regularly reaffirm those positions. Thus it is not a blanket opposition to the Civil Rights Act of 1984 which prompts this statement.

The problem which we have with the Act is the breadth of the definition of the term "recipient" as it relates to Federal financial assistance. In every instance in the bill "recipient" is defined as "any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity). . . ." By including "or other entity," the bill leaves open the probability that churches and the undertakings which are integral to the religious mission of those churches may be classified in administrative rules and regulations as recipients.

The Southern Baptist Convention in its annual meeting addressed this problem in a resolution it adopted on June 14, 1984:

ON THE CIVIL RIGHTS ACT OF 1984

WHEREAS, The United States Congress is currently considering the Civil Rights Act of 1984; and

WHEREAS, That Act, because of bipartisan support, will likely pass this summer; and

WHEREAS, that Act seeks to clarify the application of previous existing acts which prohibit discrimination on the basis of race, religion, sex, and age; and

WHEREAS, Many religious schools and exclusively religious organizations have scrupulously avoided direct federal financial assistance so that they could maintain independence from federal regulation and interference; and

WHEREAS, That Act, in defining organizations which are to be considered "recipients" of federal financial assistance includes categories which may be misleading and which could result in undue government intrusion in the affairs of religious organizations, religious schools and institutions.

Therefore, be it RESOLVED, That we, the messengers of the Southern Baptist Convention, meeting in Kansas City, Missouri, June 12-14, 1984 request Congress to give immediate attention either to redefining the term "recipients" in the Act itself or making certain that the legislative history of the Act clearly exempts exclusively religious organizations, religious schools, and institutions from being defined as recipients of Federal financial assistance under the Act; and

Be it finally RESOLVED, That the Christian Life Commission and the Baptist Joint Committee on Public Affairs be requested to notify the Congress of this resolution as soon as possible.

There are constitutionally valid reasons why churches and those organizations integral to their religious mission may find it necessary, as a requirement of sincerely held religious beliefs, to discriminate against people in their hiring practices. A denominational school must have the right to hire teachers in sympathy with the religious beliefs of the religious group which founded and supports the school. A church which for sincere theological reasons cannot ordain women to the priesthood may not be forced to do so by the state. A church must be in control of all of the elements of admission to membership and retention of the status of member in good standing -- even if it sets minimum age standards for membership. The list could go on, but the point has been made: even though the state has a firm anti-discrimination policy and the religious community may itself oppose discrimination, the First Amendment religion clauses require that government not forbid them to make some discriminations when religious beliefs require them to do so.

Therefore, we specifically request that, wherever the Civil Rights Act of 1984 defines the term "recipient," language be added explicitly to exclude exclusively religious organizations, religious schools, and agencies integral to the church's religious mission from the category of recipients of Federal financial assistance.

James M. Dunn

STATEMENT OF

JERRY C. FRYER

NATIONAL PRESIDENT OF EDUCATION COUNCIL
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFL-CIO

BEFORE THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE
REGARDING
S.2568, THE CIVIL RIGHTS ACT OF 1984

JULY 27, 1984

The National Council of Education Locals No. 252, American Federation of Government Employees, AFL-CIO consists of 11 individual locals representing over 4,000 federal employees in the Department of Education in Washington, D.C. and the 10 regional offices of the Department. It is employees within the Council's locals that are responsible for implementing Title IX (sex), Title VI (race), Section 504 (handicap) and the Age Discrimination Act of 1975. They have considerable knowledge about the practical application of these laws before the U.S. Supreme Court in Grove City v. Bell narrowed the application of Title IX. The Council's interest in S. 2568 stems from two sources: (1) AFGE's and the AFL-CIO's historical unwavering commitment to equal opportunity and to ending discrimination and (2) the potential adverse impact Grove City uncorrected will have upon the mission of the Office for Civil Rights and the agency's funding and professional staffing levels. Grove City represents a substantial retreat from agency practices, especially in the area of postsecondary education.

I appreciate the opportunity to submit to members of the Senate Labor and Human Resources Committee, our position on S. 2568, the Civil Rights Act of 1964.

The bargaining unit employees of the eleven locals which make up the National Council of Education Locals No. 252, AFGE represent the federal employees who administer on a daily basis the four civil rights statutes that S. 2568 will amend: Title VI of the Civil Rights Act of 1964 (race discrimination), Section 504 of the Rehabilitation Act of 1973 (handicap nondiscrimination), the Age Discrimination Act of 1975 (age nondiscrimination), annd Title IX of the Education Amendments of 1972 (sex nondiscrimination). As such we are probably more knowledgeable about the practical application of these laws and the proposed changes than are most of the other witnesses from whom you have heard. We hope that our presentation will cut through much of the rhetoric and false claims and concerns that this legislation has raised.

Myth #1: "[T]he Court's 'programmatic' reading of Title IX represents no change in the law." (Reynolds' Testimony)

The Supreme Court bought a puzzling interpretation of Title IX urged on the court by the Department of Justice. The Office for Civil Rights which implements the law never implemented it the way the Justice Department sought to narrow it.

At the outset it is necessary to understand that there are two very distinct legal concepts concerning the statute as applied by the Office for Civil Rights. The phrase "program or activity" refers to the jurisdictional question of which of a recipient's actions are subject to investigation by OCR. "Pinpointing" on the other hand refers to the termination of Federal financial assistance based on a particular violation. Grove City dealt with the former. Both the Office for Civil Rights' brief in administrative proceedings and the Justice Department pleadings in the lower court level took the position, one held by the past three administrations, that OCR jurisdiction reached over the entire college. The Office for Civil Rights jurisdiction reaches over the entire institution under a "release of funds" or a "benefit" theory. Under the 1974 Bob Jones University case, when one part of a college receives Federal financial assistance, local funds that would otherwise have to be spent to support that part are thereby released, allowing the college to spend that money on other parts of the college's operation. Under the "benefit" theory, a part of the college may not directly receive Federal financial assistance but in most instances benefits by the activity of the college which does receive Federal aid. The term "program" itself varies from case to case. Sometimes a program is coextensive with an institution e.g. a vocational training school or a law school. Sometimes it may be bigger, such as a statewide program involving several institutions. What the Justice Department did was to urge on the Court a novel definition of "program" always smaller than the institution itself so that OCR's authority would be limited to an English Department or that operation of an institution described in the narrowest terms in the application submitted to the Education Department for a grant. The problem in Grove City was that such a narrow definition did not fit well with respect to Basic Educational

Opportunity or Pell Grants. Therefore, the Justice Department had to make up a program to narrow the scope of OCR's reach. Without any basis in the record concerning the actual use the college put the money to, the Justice Department asserted that since the funds go to students to pay for tuition, it must be only the college's "student aid program" that OCR would have jurisdiction over. It looked to what the students used the funds for, not what the recipient institution used the funds for. This indeed was a radical departure not only from OCR's customary practice but also from the Justice Department's own position during proceedings in the lower court level of this very case. Thus, the Court's programmatic reading of the statute as urged by the Justice Department's Supreme Court brief represented a significant change in the law and in practice.

Myth #2: "_Thus, if a federal agency extends federal assistance to a State university system, all other State departments or agencies -- whether or not they are educational or perform an education service -- would presumably be brought within the coverage_." (Reynolds' Testimony)

The Justice Department erroneously suggests that the definition of "recipient" which happens to track the existing Federal regulatory definitions of that term under Title VI, Title IX and Section 504, is so broad that OCR would have jurisdiction over state departments other than education, such as a state highway department. And it is suggested that OCR has no knowledge or expertise in highways. The Justice Department maintains that the phrase defining a "recipient" as an entity "which receives support from the extension of Federal financial assistance to any of its subunits" is so broad that under a trickle-up theory it could cover the entire governmental opeation of a "State." There are several fairly obvious fallacies in this myth. An entire state never receives Federal funds or receives support from such funds. There is no such thing as an entity in the government called the "State." It is always a department of education or a university or a local board of education. Second, OCR does not investigate education or highways; it investigates discrimination. Finally, coverage would only extend from a subunit of an entity to the entity to the extent that that it is "integrally related" to the recipient directly funded. Thus, if the issue was discrimination by a local school board against handicapped students in the failure to provide certain educational services, the state department of education would be implicated only to the extent that it has oversight responsibilities "integrally related" to activity in question. OCR's investigative authority would extend only to the state department of education's oversight duties with respect to this particular recipient.

Myth #3: "As to the fund termination provisions, [the bill] replaces the current 'pinpoint' language . . . which would permit fund termination of a worthwhile and needy program which has never been operated in a discriminatory manner . . ." (Reynolds' Testimony)

As previously mentioned, the concept of "pinpointing" refers to the termination of Federal financial assistance through enforcement proceedings. The Justice Department suggests that the pinpoint concept is abandoned under the proposed bill and if it is not as its supporters allege, then why not leave in the pinpoint provisions of the original law which are sufficient? The pinpoint provisions in the original law have the words "particular program or part thereof" which by using the word "program" under the new Supreme Court definition confuses the concepts of program or activity with pinpointing. The language has to be corrected because of the intrusion of the new Court decision as urged by the Justice Department. The new clarifying language in the bill retains the pinpoint concept. It provides for the termination of assistance to be limited to the particular political entity or part thereof to which a finding of discrimination has been made and to be limited in its effect to that particular assistance which supports the discrimination so found. It keeps the letter and spirit of _Board of Public Instruction_ v. _Finch_, 414 F. 2d 1068 (5th Cir. 1969) which limits termination to those Federal funds infected by discrimination. 1/

Myth #4: "[_Recipients_] _would be subjected to vague anti-discrimination fishing expeditions by federal enforcement officials_ . . . _Complainants could file with several agencies resulting in dulication of effort and inefficiency_ . . . _Agencies would be statutorily responsible for the activities of_ . . .

federally funded and unfunded components." (Reynolds' Testimony)

The proposed language does not add or subtract from traditional Office for Civil Rights jurisdiction. Those recipients who allege future Federal fishing expeditions have been alleging the same concerns about the past enforcement of civil rights laws. Such allegations deserve no more respect now than they did years ago.

As to duplication of effort by multiple agencies, the Office for Civil Rights has in place already a policy of not duplicating other agency investigations that comply with OCR standards. The proposed legislation does not change this one way or the other.

The Office for Civil Rights would not be responsible for civil rights enforcement outside recipients funded by U.S. Department of Education funds. The Department of Transportation will continue to be responsible for enforcement with respect to state highway departments. The Department of Health and Human Services will continue to be responsible for state health agencies and so forth.

Rhetoric aside, there should be at this late date no hesitation on the Committee's part in reaffirming that discrimination has no place in our nation and this routine legislation prohibiting the extension of Federal financial assistance to support it should receive unequivocal support.

Footnote

1/

Contrary to Justice Department claims of overinclusion, the practical problem is just the opposite. In the only case where a recipient school system has Federal financial assistance currently terminated, the system continues to recieve Federal funds from the Department of Agriculture infected with discrimination. The Department of Agriculture declined to participate in the proceedings to terminate assistance or let the Office for Civil Rights receive a delegation of authority. While Department of Education funds have ceased, Department of Agriculture funds, unearmarked and utilized for general administrative purposes flow.

HUGH C. NEWTON AND ASSOCIATES
PUBLIC RELATIONS

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NO TRUTH IN LABELLING WITH CIVIL RIGHTS ACT HILLSDALE PRESIDENT SAYS

WASHINGTON D.C., May 17 ---- Describing the bill as one that "would enforce not civil rights, but civil wrongs," Dr. George Roche, President of Hillsdale College in Michigan and Chairman of the National Council on Educational Research today urged Congress to reject H.R. 5490, the so-called 'Civil Rights Act of 1984'".

In testimony before the House Committees on Judiciary and Education and Labor, Dr. Roche took note of the fact "exactly 30 years ago today, a few hundred yards from this spot, that civil rights received an historic affirmation when the U.S. Supreme Court handed down its ruling in Brown V. Board of Education." Unfortunately, Dr. Roche said, "I would have to note with sadness that to call this bill the 'Civil Rights Act of 1984' reflects no truth in labelling."

The bill, Dr. Roche said, would negate the concept of program specificity as approved by the Supreme Court in its ruling in the case of Grove City College V. Bell last February 28. "Specifically, the Court ruled that the monitoring of non-discriminatory conduct by a college or university under Title IX is program specific - that it does not extend throughout an entire institution by virtue of grants to one particular department or activity within the institution.

"The bill would enforce not civil rights, but civil wrongs...upon institutions both large and small, both public and private, throughout our society...all would be subjected to vague anti-discrimination fishing expeditions by federal enforcement officials operating in a climate of perpetual suspicion and often without clear jurisdictional boundary even between one federal enforcement office and the next."

..more

Dr. Roche added that "the burdens, the penalties and the inconvenience would rest more heavily on the individual citizens who look to these entities for services - and, as usual, the citizens who are the most disadvantaged would feel the effects most sharply. More often than not, these would be members of racial minorities, or women, or handicapped people, or the elderly - the very persons this bill purports to protect."

"And for what? To ensure that no one is discriminated against, that no one is treated unfairly. The goal is a noble one, but there are already ample statutes, enforcement powers and court rulings on the books, to see the goal progressively better realized. There comes a point at which granting ever broader enforcement powers to government and imposing ever more stringent reporting and compliance requirements on our public and private institutions, begins to become counter-productive. That point has been reached.

"The cure being proposed here is far worse than the disease which the sponsors of the bill have diagnosed - if in fact the diagnosis itself is even correct.

INDIRECT AID

"The concept of program specificity," Dr. Roche testified, "is reasonable and sound. The Congress should, if anything, reaffirm it with legislation, not supercede it.

"It is the other half of the Grove City decision, much less noted in the press and here on Capitol Hill which urgently needs to be overturned. I refer to the unanimous holding of the court to the effect that something called 'indirect' aid to a college or university occurs whenever an institution accepts from one of its students, customers, or clients, a dollar which that private individual received from some federal assistance program. This 'indirect aid,' the court ruled, subjects the recipient institution to federal control every bit as much as the institution's own direct acceptance of federal funds would do. I believe that it is difficult to overstate how pernicious and how widespread would be the effects of allowing such a doctrine to stand as the law of the land, let alone extending that doctrine through the present bill to cover vast new areas of activity which were previously understood as private."

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TESTIMONY

Committees on Judiciary and Education and Labor
H. R. 5490, the "Civil Rights Act of 1984"

May 17, 1984

George Roche
Hillsdale College

I appreciate the opportunity to testify before these assembled sub-committees this morning. The bill under consideration, H.R. 5490, the "Civil Rights Act of 1984," is meant to clarify the intent of, and close certain perceived loopholes in, several existing statutes including Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and Title VI of the Civil Rights Act of 1964.

My credentials to testify on this legislation are not so much personal as institutional. As president of Hillsdale College in Michigan, I have the privilege of appearing today on behalf of an institution which enjoys an unparalleled 140 year record of commitment to individual dignity, equal opportunity, academic freedom, limited government and the self-responsibility of free men and women associating to achieve their purposes in private, voluntary ways.

In particular, Hillsdale can submit for your consideration the sobering lessons of its nine-year ordeal of litigation and bureaucratic harassment under a tortured interpretation of Title IX -- an ordeal that could be re-enacted thousands of times throughout our society if this bill becomes law.

I might add that my personal experience with the subject under consideration today also includes having served since 1982 as Chairman of the National Council on Educational Research, a policy-setting body within the U.S. Department of Education, and having authored several books in this field. Education In America (1971) analyzed the current state of teaching and learning in this country and anticipated many of the findings of the celebrated 1973 Presidential Commission Report,"A Nation at Risk." The Balancing Act: Quota Hiring in Higher Education (1974) explored the harm being done to free inquiry by reverse discrimination policies. America By The Throat: The Stranglehold of Federal Bureaucracy (1983) explored the dynamics of growing government power at the expense of the private sector and the individual.

H.R. 5490 has been impressively titled the "Civil Rights Act of 1984." This title certainly commands our most respectful attention. After all, it was exactly thirty years ago today, a few hundred yards from this spot, that civil rights received an historic affirmation when the U.S. Supreme Court handed down its ruling in Brown vs. Board of Education.

The self-evident truth that all men are created equal, proclaimed by Jefferson and The Declaration of Independence and pushed forward significantly yet not conclusively by Lincoln in the Emancipation Proclamation, gained new meaning and force for Americans of all colors and both sexes in the 1954 Brown decision. The wake of federal, state, and local government power was decisively shifted in one stroke on that May morning -- shifted at long last away from the side of unjust, unequal treatment of persons according to irrelevant labels and categories, over to the just, right, and moral side of impartial treatment, individual merit, and equal opportunity for all.

The ensuing three decades have been a long road of implementation for the original color-blind principle of the Brown decision, of course. There have been other legislative and judicial milestones along the way -- many moments that we can be proud of as a nation. There have also been unfortunately a number of wrong turns in the road, moments of losing the clear principle and slipping back to the old injustice under new disguises. There have [illegible] been moments when the very principle of equal rights for all has been violated, turned completely upside down, in the name of equality itself. As patriotism and the flag can sometimes become the refuge of scoundrels, so the rhetoric of civil rights is sometimes appropriated by the power hungry and the seekers of special privilege through government intervention on their behalf. All of us who cherish the genuine article called civil rights and equal treatment bear the obligation of vigilance against such counterfeits as these, counterfeits which both dishonor the concept of equality and visit very real harm upon individuals in our society as well as upon the institutions which helped provide structure and meaning in the lives of individuals.

Mr. Chairman, after careful study of the proposed legislation, I would have to say with sadness that to call this bill the "Civil Rights Act of 1984" reflects no truth in labelling.

The bill would enforce not civil rights, but civil wrongs. Those wrongs would be perpetrated upon institutions both large and small, both public and private, throughout our society. Schools and colleges, hospitals and clinics, agencies of state and local government, large corporations and the corner grocery store, all would be subjected to vague anti-discrimination fishing expeditions by federal enforcement officials operating in a climate of perpetual suspicion and often without clear jurisdictional boundary even between one federal enforcement office and the next.

The financial, administrative, and psychological cost of doing business and delivering necessary services would be significantly increased for all the entities I have named. In the end, the burdens, the penalties, and the inconvenience would rest most heavily on the individual citizens who look to these entities for services -- and as usual, the citizens who are the most disadvantaged would feel the effects most sharply. More often than not, these would be members of racial minorities, or women, or handicapped people, or the elderly -- the very persons this bill purports to protect.

And for what? To insure that no one is discriminated against, that no one is treated unfairly. The goal is a noble one, but there are already ample statutes, enforcement powers and court rulings on the books, to see the goal progressively better realized. There comes a point at which granting ever broader enforcement powers to government and imposing ever more stringent reporting and compliance requirements on our public and private institutions, begins to become counter-productive. That point has been reached with the bill presently under consideration.

As Professor Harvey Mansfield of Harvard recently put it, many affirmative action programs and other anti-discrimination activities of government have become in the 1980s, attempts to kick down a door that is already open. That kind of kicking, blindly continued in response to interest group pressures or rhetorical abstractions rather than in proportion to genuine need, is bound to hurt someone. In this case, I submit that it hurts both those who are in the process of passing through the open door of equal opportunity in our society and those officials already working in good faith to hold the door open, and in fact it may even hurt the very structure of the door itself.

That is, this blind pursuit of social perfection, this snowballing aggrandizement of federal power and proportionate subjugation of every other institution to such power, is beginning to weaken in a very real way, the pluralism, diversity, and broad-based institutional stability of American life, the stability and adaptability that have been the source of our marvelous openness and youthfulness as a society over the past two centuries.

The Supreme Court, ruling in the case Grove City Collge v. Bell this past February 28, acted with a measure of sensible recognition that the remedy for actual or potential discrimination must be proportionate to the harm such discrimination might do. Specifically, the court ruled that the monitoring of non-discriminatory conduct by a college or university under Title IX is program specific -- that it does not extend throughout an entire institution by virtue of grants to one particular department or activity within the institution.

Now, in an election year rush to set aside this sensible ruling, the present legislation has been drafted in breathtakingly broad terms -- whether by design or carelessness I have no idea -- but nonetheless with the very real effect of sweeping away the program specific limitation, not only within education, but also in all of the other areas and institutions I mentioned a moment ago.

Taking stock of the federal bureaucratic aggrandizement certain to flow from enactment of the bill in its present form, and of the corresponding congestion and demoralization within many other institutions thus subjected to the heavy hand of bureaucratic monitoring, we can safely say that the cure being proposed here is far worse than the disease which the sponsors of the bill have diagnosed -- if in fact the diagnosis itself is even correct.

And I must personally disagree with that diagnosis as well, Mr. Chairman. Judging by the yardstick of limited government as laid down in the Declaration of Independence and the Constitution of the United States, judging by any measure of a healthy balance between the public and private sectors in a free society, I believe we must conclude that legislative action in response to the Grove City decision ought to be just the opposite of what the present bill envisions.

The concept of program specificity is reasonable and sound. The Congress should if anything reaffirm it with legislation, not supercede it.

It is the other half of the Grove City decision, much less noted in the press and here on Capital Hill, which urgently needs to be overturned. I refer to the unanimous holding of the court to the effect that something called "indirect aid" to a college or university (and hereafter, should the present bill pass, to countless other institutions as well) occurs whenever an institution accepts from one of its students, customers, or clients, a dollar which that private individual received from some federal assistance program. This "indirect aid," the court ruled, subjects the recipient institution to federal control every bit as much as the institution's own direct acceptance of federal funds would do. I believe that it is difficult to overstate how pernicious and how widespread would be the effects of allowing such a doctrine to stand as the law of the land, let alone extending that doctrine through the present bill to cover vast new areas of activity which were previously understood as private.

One of the great sources of strength for America has been our status as an open society. Within that society the individual has been free to provide for himself and his family, to compete with others, or to combine with them in private voluntary associations. We have been free to support those professions, businesses, schools, hospitals or churches which best met our individual needs and preferences. In other words, we have prospered with competition and voluntary association, with the private sector in all its diversity.

We have done this in America, not through any commitment to an abstract ideology, but because we found it to be a system which works well. In the words of George Santayana, "The American people have made a philosophy out of not having a philosophy." We have found that the system works not only in the production of wealth, but also in the redistribution of wealth into all those channels of society where people felt it would yield the greatest results. We have proven that when men have the right to form those private, voluntary arrangements which solve their problems and meet their needs, both they and society will prosper.

The system has worked beautifully beyond the wildest dreams of the most utopian social planner. But it has worked precisely because we have allowed these voluntary associations the right to compete, the right to be different and the right to be uniquely themselves. When competing services are available, people have a choice and every choice extends freedom a little further. Competition and voluntary association change freedom from an empty battle cry into a vital part of everyday life.

Such freedom gives people the opportunity to make decisions on the basis of their own needs and preferences. And those decisions are not merely an additional freedom — they are freedom itself. When we have real control over our lives and preferences — over how we earn a living, worship our God, educate our children — real freedom is present. In the absence of such choices, words like freedom become meaningless abstractions.

Competition and voluntary association, sometimes called the private sector here in American society, have done more to provide the essential mechanism of freedom than any other single element in our national make-up. We Americans have made freedom work. Those most progressive occasions in American society, in the best sense of the word, have been those occasions when our society was most truly free. And it is the private sector which has made this possible. Sweeping away all distinctions between the private and public sectors threatens that political, economic, and social success.

Not too many years ago Hillsdale was assured by government planners and by many educators throughout the nation that government subsidy of education would not bring government control. How distant and dated such assurances seem now. Those institutions which have chosen to sup at the government table now find that they are subject to a great and growing mass of bureaucratic control. National social engineering projects on the part of the public sector are replacing private standards with public standards concerning what teachers are to be hired, what students are to be admitted and what is to be taught in the classroom. Political pressures are rapidly replacing private standards as the arbiter for most educational decisions undertaken today.

Limited government is the very cornerstone of our American system. Limited government means that most of the institutions and most of the decisions in a society remain private and voluntary, not public and coercive. The "indirect aid" formula advanced under Title IX and affirmed by the Supreme Court in Grove City v. Bell, effectively holding that every dollar which had ever passed through federal hands continues to carry federal control with it wherever it is spent thereafter, makes a mockery of the limited government idea. It goes far toward erasing any meaningful distinction between what is public and what is private in the United States any more.

That the Supreme Court should have upheld this doctrine without a single dissenting vote is disturbing evidence of how lightly the principles of the Declaration of Independence are regarded today, even by the constitutional bodies most sternly charged with their guardianship.

That both Houses of Congress are now moving with ill-considered haste to take up legislation for extending the "indirect aid" doctrine beyond education into every area of American life, is certainly more depressing still.

Let me turn now, Mr. Chairman, to Hillsdale College's experience over the past decade, under the impact of precisely the kind of legislation which the present bill would vastly extend.

Hillsdale College has for 140 years shunned both government assistance and government control in order to fulfill its founders' purpose of offering a liberal arts education untainted by the restrictions on free inquiry which inevitably accompany reliance on government support.

Founded by Free Will Baptist abolitionists in 1844, Hillsdale has always had a vigorously open admissions and employment policy. The first woman in Michigan, and the second anywhere in the United States, to receive a Bachelor of Arts degree was a 1856 Hillsdale graduate. Blacks were also among Hillsdale's first graduates, nearly a century before it came to Washington's attention to press for open admissions.

Yet despite this record of absolute independence from government funding of any kind, and despite this exemplary record of non-discrimination and equal opportunity — a record never challenged by the government or anyone else — Hillsdale has found itself since 1975 defined as an institution receiving federal aid, through the farfetched semantic definition I eluded to a moment ago. Hillsdale's alleged status as an institution receiving federal aid is based on our enrolling students who receive federal grants and loans as individuals, and then elect to apply those funds toward their tuition at Hillsdale. When this pretext for the extension of government control over our affairs as a private college was first put forward nearly a decade ago, the Hillsdale College Board of Trustees formally resolved to resist the intrusion by all means available to us. Hillsdale was the original litigant in what subsequently came to be called the case of Grove City College v. Bell. As mentioned earlier in my testimony, the Title IX "indirect aid" pretext for government intervention in the affairs of Grove City College and Hillsdale College was finally upheld by the U. S. Supreme Court earlier this year.

That ruling appears to present Hillsdale with a stark choice. We can either sign a compliance form acknowledging we are subject to federal control — in effect, a blank search warrant authorizing widespread bureaucratic intrusion into our records and decision-makin processes, an obligation for Hillsdale to be considered guilty until proven innocent, even in the absence of any allegations against us. Or we may have to disengage from the National Defense Student Loans, Basic Educational Opportunity Grants, and other student assistance programs in question, at significant potential hardship to hundreds of our students and major financial jeopardy for the college. We estimate that as many as 300 of Hillsdale's 1000 students might be affected by such a disengagement from student aid programs, at a total cost approaching $1 million dollars per year.

Yet Hillsdale College's response, voted unanimously by our Board of Trustees on May 11, 1984, remains consistent with our stand for principle since 1844. We shall stand on our refusal to sign the compliance forms when and if they are next presented to us. And if such a refusal makes it necessary, we shall cease accepting, from any student, tuition dollars with federal strings attached. We shall endeavor to make available, to any student thereby deprived of federal aid, equivalent funds from private sector sources.

The Supreme Court's interpretation of Title IX as justifying federal control over any institution where individual aid recipients spend their funds, is an Alice-in-Wonderland attempt to police discrimination where no discrimination has been alleged. All of the dislocations, burdens, injustices, and hardships which I hypothetically described in reference to the likely effects of the bill you are considering, are now on Hillsdale College's doorstep as eminent realities. Yet the fact remains that Hillsdale has been extending equal opportunity to women and blacks since well before the Civil War, and [redacted] its record in this regard has never been disputed by the government. Ironically and tragically, by forcing Hillsdale to warn its students away from accepting federal tuition aid, as the price of preserving our independence from government control, the Grove City ruling — and still more so the proposed legislation — threaten to narrow the very conditions of equal educational opportunity they purport to defend.

Speaking again simply for the one small institution I am associated with, Mr. Chairman, I can state that Hillsdale is determined that neither the Court ruling nor the proposed legislation will actually have such a discriminatory effect in our own case. We are committed to replacing any lost federal dollars with equivalent private resources made available by fair-minded individuals throughout this country who have come forward to stand with us in increasing numbers since this case began nine years ago.

The legislation before these Subcommittees may pass, or it may fail of passage. Based on the election year mood that seems to prevail, I am not sanguine that the legislation will be rejected. Nevertheless, we at Hillsdale hope to make it clear by our example that there is another path Americans can take. The principle of private independence from public intervention, though severely set back in Congress and the courts, can still find ultimate defense in the marketplace. This is the defense to which Hillsdale College will turn if our next round of rejection of the Title IX compliance forms makes it necessary. We shall set out to make enrollment at Hillsdale accessible to students of every economic background with the sole support of dollars honestly earned in the free economy and voluntarily donated to this private institution, dollars that have never had to be taxed away by the government middleman and then redistributed through tuition aid programs with strings attached. The Supreme Court and Congress seem to be saying, wrongly but unequivocally, that wherever federal dollars can remotely be construed to go, federal control will now go with them. There remains no benefit of the doubt for private institutions, no grey area. Hillsdale will therefore have no choice but to step decisively out of that former grey area and affirm its total reliance on those private sector resources from which America's strength has always grown.

If the proposed legislation passes, this will be the only recourse for many other formerly private institutions which wish to preserve their independence. Unfortunately, countless other institutions will find themselves too heavily entangled already with federal assistance to disengage totally as we propose to do. It is especially for the protection of such institutions caught in the middle that the hasty over-reaction embodied in the proposed bill must be rejected by the Congress, if clearer heads can prevail.

Ultimately the question comes down to our asking "What sort of society do we want?" If we have no objection to a directed and regulated society, then there will be no objection to the bureaucracy operating in the way it does, often making its decisions administratively rather than by public consent in elective chambers. There can be no objection to it using its powers to discriminate against all alternative philosophies and all alternative ideas of service if what we want is a regulated and directed society. Nor can we object to seeing bureaucrats as those who make the decisions, defining what constitutes an adequate education, or appropriate health care. We cannot complain about these things if what we want is a regulated and directed society. And no protest can be made when we see every passing craze and unbalanced ideology foisted into our service institutions in the name of "progress." I repeat: No complaint can be made if what we want is the directed and regulated society.

If, on the other hand, we seek a society in which men and women make their own decisions, and have the right to choose institutions and services which are compatible with their own deeply-held convictions, then we must sharply limit the power of the governmental regulatory agencies, putting that power back in the hands of the American people.

Do the American people wish to lead their own lives and make their own decisions, or do we want a Washington bureaucracy to control our lives and make our decisions for us?

I believe the answer to that question is self-evident. Accordingly Hillsdale will continue to contest the extension of arbitrary and capricious bureaucratic interference with the private affairs of individuals who freely choose to attend our college and with the legitimate sphere of decision-making of the college itself. By the same principle, I urge in the strongest terms that these Subcommittees act unfavorably on the misconceived, mis-named, and dangerous legislation now before them.

I thank the Chairman and the members for this opportunity to present my views and those of Hillsdale College. I will welcome your questions on any portion of my testimony.

American Hospital Association

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Telephone 202.638.1100
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June 12, 1984

Dear Senator Hatch

This letter is submitted by the American Hospital Association to express the concerns of certain of its hospital members regarding the scope of the Civil Rights Act of 1984. The AHA believes that it is appropriate for the Committee to be advised of the nature of these concerns, particularly to the extent that they are consistent with issues raised previously by witnesses from the Administration.

There is no question that hospitals subscribe to the purposes and objectives of federal civil rights laws, which may be summarized as nondiscrimination on the basis of race, color, creed, national origin, age, sex, or handicap. Indeed, within these several bases may be found epidemiologic and social factors which define important health care needs of American population subgroups. Accordingly, hospitals do not suggest that health services should be immune from appropriate requirements for nondiscrimination.* However, we are concerned about an unintended consequence of the Civil Rights Act of 1984; that is, the possible hindrance of efforts to deliver hospital care effectively and in accordance with appropriate standards of medical care. Two concerns in particular warrant your attention:

> First, the statutory elimination of the "program-specific" limitation defined by the U.S. Supreme Court in the Grove City decision, may hinder otherwise reasonable efforts to assure nondiscrimination and may cause hospitals to lack knowledge of the legal standards to which they would be held. For example, many hospitals are legal entities of state or local government. Others are divisions of corporations which carry on commercial, research, or other non-patient care functions in totally separate divisions. Still others are part of, or affiliated in a less formal manner with, public institutions of higher learning.

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* The exact scope of these requirements, as they may pertain to hospitals by virtue of their participation in the Medicare and Medicaid programs, presently remains at issue before the courts.

Under H.R. 5490, it has been suggested that educational assistance to a university would trigger enforcement responsibilities for federal education agencies within a hospital affiliated with, but not part of, the university. Or, federal assistance to a county's road program would cause requirements promulgated by federal transportation agencies to be enforced against the county hospital. In a third case, federal assistance to a hospital would bring associated nondiscrimination requirements to bear on an unassisted medical research organization owned by the hospital's parent corporation. These hypothetical consequences, although perhaps not intended, indicate that the proposed Act could greatly expand the reach of federal agencies, create competing or inconsistent requirements for hospitals, and could add greatly to the regulatory burden of one of the most highly regulated segments of our economy.

It has been suggested that the purpose of the Civil Rights Act of 1984, i.e., to overturn the program-specific result of Grove City, could be accomplished in a more carefully drawn and narrower fashion, particularly if legislative consideration were more open and thorough.

The second issue concerns the apparent potential of this bill, in its approach to reversing Grove City, to fundamentally change the legal standard under the amended acts from one of intent to discriminate to one of discriminatory effect. If so construed, this change could be a significant problem in the delivery of medical care.

As noted, the prohibited bases of discrimination also define population subgroups with particular medical problems. Thus, for example, handicap is both a prohibited basis for discrimination and a defining characteristic of an individual's medical condition. Questions of discrimination against a particular subgroup under an "effects" test may well put federal agencies in the untenable and inappropriate role of defining standards of medical care. Indeed, the recent "Baby Jane Doe" controversy in New York demonstrated the difficulty of defining discrimination, even under existing interpretations of the law, in the context of decisions to provide a specific course of medical treatment. Although we do not believe this legislation would undo the appropriate interpretation of Section 504 rendered by the U.S. Court of Appeals for the Second Circuit in the "Baby Jane Doe" case, we fear that the ambiguities which necessitated such litigation would be increased.

Again, it would appear that more deliberate consideration of the options available to overturn the Grove City decision would be appropriate for the purpose of avoiding these untoward results.

Finally, we would like to call the Committee's attention to an enforcement issue raised by the legislation. H.R. 5490 would overturn judicial interpretation of the "program-specificity" requirements of federal law, which interpretation was adhered to in all federal judicial circuits (except the Third

Circuit in Grove City). To the extent complaints brought under the several acts remain unresolved at the administrative or judicial levels at this time, sanctions flowing from determinations of noncompliance following the enactment of H.R. 5490 should be prospective only. Assisted entities should not suffer the termination of such assistance as a result of actions taken in compliance with the law as it now exists. Although we believe this to be the intent of H.R. 5490, we believe an explicit statement of this intent to be necessary.

In conclusion, the AHA does not seek special treatment for its membership under the civil rights laws to the extent their activities are legitimately deemed within the scope of those legal obligations. It does appear, however, that the existence of significant interpretive concerns arising out of the bill's ambiguities argues convincingly for additional deliberations and the development of more precisely focused legislation. We would be pleased to add our resources to any effort which the Committee might undertake to cure these problems.

Please feel free to contact me or Richard L. Epstein, AHA Senior Vice President and General Counsel in our Chicago Office, if we may provide further assistance or clarification of the issues raised herein.

Sincerely

Jack W. Owen

Jack W. Owen
Executive Vice President

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THE UNDER SECRETARY OF LABOR
WASHINGTON

JUN 25 1984

Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

Secretary Donovan has asked me to respond to your letter of May 29, 1984 concerning the Department of Labor's (DOL) perspective on the effects of S. 2568, the proposed "Civil Rights Act of 1984." Specifically, you asked that we comment on the effects this bill would have on our substantive responsibilities in administering various federal grant programs within the Department's jurisdiction. You have also asked that we comment on the enforcement aspects of the proposed bill.

With regard to our responsibilities in administering the various federal grant programs, we are concerned that clarification of the bill's requirements is necessary if we are to avoid adversely affecting the willingness of private sector employers to get involved in programs under the Job Training Partnership Act (JTPA) as well as the Emergency Veterans' Job Training Act (EVJTA).

In that regard, we are concerned that the broad language of S. 2568, together with the statements in the reports of the House Judiciary and Education and Labor Committees that, as a result of this legislation, "a recipient of federal financial assistance will understand that receipt of federal funds means it is covered throughout its operations" (see page 26 of the Judiciary Committee's report), would be perceived by many employers as expanding the substantive scope of Department of Labor regulations under these statutes to employer activities totally unrelated to the operation of the federally assisted training programs; resulting in increased reporting, exposure to compliance reviews, and other regulatory burdens. Faulty or not, such a perception, if prevalent among employers, could have significant adverse consequences for training and employment programs.

Section 167 of JTPA makes clear that those entities operating training and selected programs are subject to federal nondiscrimination prohibitions. It does not extend those prohibitions to employing establishments that are in contact with JTPA programs. If S. 2568 were construed as broadly as reflected in the Justice Department's May 24 letter to you on this subject, it might be possible for employers to believe that association with JTPA or the emergency veterans' job training program may increase their exposure and liability under the various civil rights laws.

S. 2568's broad language extending coverage not only to direct recipients, but to any "successor, assignee, or transferee of any [entity] to which Federal financial assistance is extended ...," would, absent clarification, create further uncertainty among employers and the entities with which they do business.

It is possible, therefore, that S. 2568 would cause employers to avoid federally supported training and employment services in a belief that they were prudently avoiding "new" burdens or compliance risks. Under such circumstances, employers:

-- Might not provide training slots for JTPA;

-- Might not provide training slots for EVJTA;

-- Might not list jobs with the employment service;

-- Might not take advantage of the Targeted Jobs Tax Credit (TJTC); and

-- Might not serve on Private Industry Councils (PICs) and State Job Training Coordinating Councils (SJTCCs).

In sum, unless S. 2568 makes clear the implications for employers who become associated with training and employment services, it may discourage employers' participation in such activities. This, in turn, will condemn such activities to futility.

It would also appear that under S. 2568, the entire workforce of States which receive assistance from several DOL component agencies (the Employment and Training Administration, the Mine Safety and Health Administration, the Occupational Safety and Health Administration) could be covered by the nondiscrimination provisions of section 504 of the Rehabilitation Act of 1973. The Department has, in the past, interpreted section 504 to cover only those employees directly employed with DOL funds or in connection with the specific DOL-funded programs. Potentially, under S. 2568, any employee, even one working in an area unrelated to a DOL-funded program, could file a complaint with the Department's Office of Civil Rights. That Office would be required to accept and process such a complaint. Moreover, the same complaint could just as likely be filed with several other agencies, thereby leading to "determination shopping."

We would like to make clear that we fully support the objective of equal employment opportunity for all Americans. However, imprecise legislation may have adverse consequences which should be avoided.

We appreciate the opportunity to comment on this significant undertaking.

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Ford B. Ford

Ford B. Ford

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 24, 1984

Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This presents the views of the Department of Justice on S. 2568 and H.R. 5490, the proposed "Civil Rights Act of 1984." 1/ The bill would amend Title IX of the Education Amendments of 1972, 2/ Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 3/ the Age Discrimination Act of

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1/ H.R. 5490 is in all respects identical to S. 2568. For the sake of convenience, we refer to them interchangeably as "S. 2568" or "the bill."

2/

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681.

3/

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794.

1975 ("ADA"), 4/ and Title VI of the Civil Rights Act of 1964, 5/ all of which prohibit certain types of discrimination in federally assisted programs. This memorandum sets forth the background and what we perceive to be the possible effects of the amendments. We use Title VI, after which the other three statutes were patterned, 6/ to illustrate the proposed changes. We then discuss the constitutional issues raised by the bill. On the basis of this analysis, we conclude that the proposed amendments are not facially unconstitutional. Nevertheless, ambiguities in the language of the proposed amendments raise significant questions concerning their intended scope and application. Absent a clear statement in the language of the amendments or their legislative history, the courts will ultimately have to determine the proper extent and operation of the amendments. We have therefore examined the case law concerning the constitutional bases for such legislation -- the Spending Clause and Section 5 of the Fourteenth Amendment -- in order to evaluate how courts are likely to interpret the amendments and what limits, if any, the courts are likely to impose on them.

4/

> [With certain exceptions] no person shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving federal financial assistance.

42 U.S.C. § 6102.

5/ Title VI prohibits discrimination on the basis of race, color, or national origin in federally assisted programs. 42 U.S.C. § 2000d (quoted at p. 4 *infra*.)

6/ *See, e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677, 694 (1979) (Title IX patterned after Title VI); *NAACP* v. *Medical Center, Inc.*, 657 F.2d 1322, 1331 (3d Cir. 1981) (en banc) (§ 504 and ADA patterned after Title VI). The four statutes are listed here in the order that they appear in the bill. The Appendix to this report contains the full text of every provision that S. 2568 would amend, reflecting both existing and proposed language.

We have encountered considerable difficulty in interpreting a bill of such sweeping scope as S. 2568 without the benefit of full legislative history. Judging from discrepancies between the sponsors' explanations and the actual language of the bill, it is apparent that the consequences of this major legislation have not yet been fully considered by the Congress. The bill is amenable to interpretations that would reach far beyond the sponsors' declared purpose -- to overturn Grove City College v. Bell, 104 S. Ct. 1211 (1984). We conclude that, while we express no view as to the necessity or wisdom of such legislation, there are alternatives to S. 2568 and H.R. 5490 that would accomplish the objective of overturning Grove City without risking upheaval of the entire civil rights landscape which has developed through twenty years of administrative and judicial efforts.

Whatever the intent of Congress in this area, because of the importance and potential impact of this legislation, we strongly recommend that Congress develop fully the legislative history, including committee hearings and reports. Potentially affected state and local government representatives and private sector recipients of federal financial assistance might be an appropriate source from which to seek views as to how the legislation would actually affect such entities. A thorough legislative analysis of this proposal will aid in reducing ambiguities and misunderstanding of the legislation and perhaps minimize lengthy judicial challenges to it.

I

BACKGROUND

The four civil rights statutes which the bill proposes to amend share a common design, having two basic elements: substantive coverage and an enforcement provision. The former defines what conduct is prohibited, while the latter sets out procedures for sanctions in the event of noncompliance. In the existing statutes, all fashioned after Title VI, as well as in the proposed amendments, these two aspects of the statutory scheme are treated distinctly.

Section 601 of the Civil Rights Act of 1964, the substantive prohibition of Title VI, currently provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d (emphasis added).

Section 602, the enforcement provision, currently provides that compliance may be effected by a termination of federal assistance under a program or activity, upon a finding of noncompliance,

> but such termination . . . shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

42 U.S.C. § 2000d-1(1) (emphasis added). Alternatively, compliance may be effected "by any other means authorized by law." Id. § 2000d-1(2).

Although the fund-termination authority has rarely been invoked, 7/ disagreement arose as to whether the "program-specific" language of § 602 was intended also to limit the scope of the nondiscrimination mandate of § 601. Thus, some courts determined that § 601 was intended to prohibit all discrimination by recipients of federal aid. See, e.g.,

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7/ More common have been cases brought under § 1983, which permits private suits for state deprivations of rights secured by the Constitution and laws of the United States. 42 U.S.C. § 1983. Because early Title VI cases were generally brought against state school districts, the substantive prohibitions of Title VI could be enforced by means of actions under § 1983. See, e.g., Singleton v. Jackson Municipal Separate School Dist., 355 F.2d 865 (5th Cir. 1966). Additionally, Title VI has been enforced through private causes of action. See p. 15, infra.

Flanagan v. President and Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976) (by accepting federal aid for building construction, school was required under Title VI to refrain from discriminating in all services and benefits provided to students). Others found that § 601 proscribed only discrimination in the particular program which received the federal aid. See, e.g., Stewart v. New York Univ., 430 F. Supp. 1305, 1314 (S.D.N.Y. 1976) (Title VI plaintiff must show "some material connection" between federal aid and alleged discrimination). Those who espoused the former view, extending private sanctions to all activities of a recipient, found support in the overall objective of the Civil Rights Act of 1964. See 110 Cong. Rec. 1521 (1964) (remarks of Rep. Celler) (to eradicate the "moral outrage of discrimination"). The latter, more restrictive, view found support both in the "pinpoint" approach of § 602 and in the narrower policy expressed by Senator Humphrey during the floor debates on the Civil Rights Act of 1964:

> "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."

110 Cong. Rec. 6543 (1964) (Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963).

This dispute was recently resolved when the Supreme Court adopted the less expansive view in Grove City College v. Bell, 104 S. Ct. 1211, 1222 (1984). In that case, the Court held that a college that accepts students who receive federal financial aid is subject to Title IX only in the administration of its financial aid program. Under the Grove City interpretation of Title IX, which presumably will affect application of the other three similar statutes as well, 8/ an institution

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8/ Although the precedential effect of Grove City on the other three statutes is not altogether clear, we would anticipate that courts would continue to interpret each of the four statutes by analogy to the others. For example, in concluding

[Footnote 8 continued on p. 6]

receiving federal aid in some of its departments would not be found to be in violation of the substantive prohibitions of the statute on the basis of discrimination in other programs. The Court rejected the argument that the entire recipient institution could be the "program or activity" and therefore be regulated in its entirety.

The sponsors of the bill purport to seek to overturn the Grove City decision and require the nondiscrimination mandate of § 601 and the similar provisions in the other three statutes to apply to all recipients of federal assistance. They assert their intention to "restore four major civil rights statutes . . . to the broad scope of coverage that was originally intended by Congress and that has marked their administration prior to [Grove City]." Cong. Rec. S4585 (Daily ed. Apr. 12, 1984) (joint explanation of Senators Kennedy and Packwood).

The bill proposes to effect this end by eliminating all references to "program or activity" which characterize the existing prohibitions and by replacing them with broad references to "recipients" of federal aid.

[Footnote 8 continued]

that a private cause of action is available under Title IX, the Supreme Court examined at great length the resolution of the same issue under Title VI, and found that evidence highly persuasive. Cannon v. University of Chicago, 441 U.S. 677, 694-709 (1979). See also NAACP v. Medical Center, Inc., 657 F.2d 1322, 1331 (3d Cir. 1981) (expressly adopting Title VI standard in case brought under § 504 and ADA). The introductory legislative history of the bill contains a statement suggesting that the bill's sponsors believe that the Department of Justice enforcement efforts will proceed on the assumption that the Grove City case is applicable to all four statutes. Cong. Rec. S4589 (Daily ed. Apr. 12, 1984) (statement of Sen. Packwood).

II

EFFECT OF THE AMENDMENTS

A. Prohibited Conduct

The first change in the operation of § 601 is to broaden the class of entities to which the prohibition applies. In contrast to the current § 601, which has now clearly been interpreted to be program-specific, the amendment would delete the words "under any program or activity receiving" and simply substitute "by any recipient of" so that the amended statute would provide:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation, be denied benefits, or be subjected to discrimination by any recipient of Federal financial assistance.

Under the bill,

> the term 'recipient' means--
>
> (1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and
>
> (2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,
>
> to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.

S. 2568, 98th Cong., 2d Sess. (1984) (emphasis added). 9/ In short, the prohibition on discrimination in a federally-aided program or activity would be changed to prohibit any discrimination in any activity by a recipient of federal funds for any of its activities.

One sponsor of S. 2568 explained the effect of the "recipient" definition as follows:

> Consistent with past agency practice, when an entity receives federal aid for one of its parts or subdivisions, the entity -- and not the specific subunit of the entity -- is the recipient. Thus, in place of "program-specific" coverage as defined by the Supreme Court, the statutes will apply to all component parts of the recipient.
>
> * * * * *
>
> Example: A state prison receives federal funding to develop a better inmate classification system, and no other federal assistance. Its education activities and related benefits, such as classes and training programs, are covered by Title IX. The entire prison -- including its educational programs -- would be covered by Title VI, Section 504, and the ADA, because it is a recipient of federal funding and those statutes are not limited to education.

Cong. Rec. S4586 (Daily ed. Apr. 12, 1984) (statement of Sen. Kennedy).

9/ This language is similar to the existing definition of "recipient" under Title VI regulations: "any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program." 28 C.F.R. § 42.102(f) (1983).

By proscribing discrimination against any person by a recipient of federal aid, broadly defined, the bill would reverse the result of Grove City. The amended statute would prohibit discrimination in any endeavor sponsored by a grantee of federal aid, including those activities that receive no federal aid. The sponsors of S. 2568 claim that this result (the simple reversal of Grove City) is the primary purpose of the bill. See, e.g., Cong. Rec. S4589 (Daily ed. Apr. 12, 1984) (statement of Sen. Packwood); id. at S4592 (statement of Sen. Cranston); id. at E1661 (statement of Rep. AuCoin); id. at E1681 (statement of Rep. Johnson).

It seems clear, however, that the bill could potentially have a much broader impact. In the first place, while the bill has been characterized as restoring the original legislative intent behind this legislation, the Supreme Court found that Congress had intended program-specific application. Thus the bill, to the extent it does reverse Grove City, widens materially the application of these federal statutes. Second, the bill extends the nondiscrimination mandate (and consequent reporting requirements) beyond merely the other unfunded programs of the same federally assisted institution. The combined effect of the change from program specificity to a prohibition on the recipient and the new definition of "recipient," is to impose the obligation not to discriminate on related entities as well. In this regard, the bill would expand substantive coverage beyond that necessary to accomplish the mere reversal of Grove City in two ways: (1) by imposing the nondiscrimination requirements upon an entire state, even if only one program of one subunit receives federal funds, if the state is deemed to "receive support" from the funds; and (2) by imposing those requirements on every subunit of a state if the state, directly or through any of its subunits, receives any federal aid. 10/

10/ Additionally, the bill adopts a separate holding of Grove City, that there is no substantive difference under Title IX between direct institutional assistance and aid received by a school through its students. 104 S. Ct. at 1217, 1220. The sponsors of S. 2568 have lauded this result and have included language in the bill to embody it. Cong. Rec. S4592 (Daily ed. April 12, 1984) (statement of Sen. Cranston). The

[Footnote 10 continued on p. 10]

In other words, the bill's definition of "recipient" is so broad that it could be construed to render a large and complex entity subject to the statutes as a result of the

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[Footnote 10 continued]

language chosen to effect this outcome, however ("directly or through another entity or a person"), suffers from the same ambiguity that afflicts the bill as a whole. It is going to be very difficult to determine, without detailed legislative history, when an entity, including a successor, assignee or transferee entity, receives aid "through another entity or a person." The sponsors appear to hold the view that this undefined standard would exclude from the definition of "recipient" "ultimate beneficiaries such as food stamp recipients or student[s] receiving Federal loans," *id*. at S4590 (statement of Sen. Dole); "the landlord whose tenant pays the rent with federal public assistance funds, the clothing store that is paid for a shirt with a Social Security check," *id*. at S4586 (statement of Sen. Kennedy); and other similarly situated "individuals and businesses which may ultimately receive federally provided dollars." *Id*. at S4595 (statement of Sen. Cranston). The term "ultimate beneficiary" in these examples is used inconsistently to mean either an individual receiving federal funds or a business or institution receiving them from the individual. This limitation, which suffers from latent ambiguities of its own, especially in the examples recited, appears to be derived from existing Title VI regulations, which expressly exclude any "ultimate beneficiary" under federal assistance programs. *See* n.9 *supra*. We are unaware, however, of any statutory language which would lead an agency or a court to exclude these or other classes of beneficiaries from the reach of the statute. Nor are we aware of any explanation for why the definition of "recipient" in the bill, which apparently is modeled on the regulatory definition of this term contained in 28 C.F.R. § 42.102(f) (1983), *supra* n.9, fails to adopt that regulation's express provision that "recipient" "does not include any ultimate beneficiary under any such program." *Id*. The omission of this language might well lead a court construing the bill's definition to conclude that Congress did intend to reach the "ultimate benficiary," whatever that term means.

receipt of funds by its most insignificant component, depending upon how a court construed the term "receives support." The bill makes no attempt to define that term. The broadest construction would be that, by accepting federal aid to one state activity, the recipient state's treasury is facilitated in its ability to support other activities. The state would thus "receive support" from any amount of federal aid.

Although currently, if a federal agency extends federal assistance, for example, to a state university system, the broadest conceivable claim would be that the entire university system is a covered "program" within the meaning of these statutes, under the bill, it is not just the university that comes within the statutes. The bill could encompass all other state departments and agencies -- whether or not they are educational or perform an education service -- that can be shown to have eventually received some of the university funds (directly or indirectly) or to have received support from the existing funding arrangements.

The bill's sponsors have not specifically advocated this result, but they have emphasized repeatedly the "broad and comprehensive" coverage that the bill is intended to effect. On the basis of this legislative sentiment, a court might feel compelled to give the amended statute the broadest interpretation that is consistent with its plain language. The definition of "recipient" contains no words of limitation other than "receives support," an ambiguous safeguard at best. 11/

11/ It is possible that the term could be read more narrowly than we have described. A court could consider the ostensible purpose of the bill -- to reverse the Grove City decision, which involved a private institution -- and conclude that receipt of assistance should be attributed vicariously only within the confines of a discrete institution. A court could adopt this approach on the presumption that Congress would not create such significant changes in major civil rights legislation without, at the very least, clearly expressing its intention to do so. Arguing against such an approach, however, is the fact that Congress could have achieved the mere reversal of Grove City in much narrower terms. If Congress nevertheless passed the more expansive provisions contained in this bill, a court might reasonably conclude that it intended to reach a multitude of new classes of recipients.

By the same token, the bill characterizes a subunit as a "recipient" if its parent unit receives federal aid. Thus if a state were to receive any aid, directly or indirectly, apparently every political subdivision and each of its component parts -- that is to say, the entire structure of a state, including its county and municipal components and the tens of thousands of different units of local governments in this nation (see City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 407-08 (1978)) -- could be included in the coverage of the statute. This broad sweep of the statutory application represents a substantial departure from past practice, and seems to create uncertainty and potential liability far beyond what is needed to reverse Grove City.

To summarize, the bill clearly creates the possibility that states, cities, counties -- and even perhaps municipal corporations, state-owned utilities and water districts -- could be required to submit to the requirements of the four statutes as a result of federal aid to one program. As we are aware of no state in the country that does not receive some federal assistance to at least some of its activities, we believe the bill is capable of surpassing any precedent in imposing federally determined standards upon state and local governments.

Thus, far from "restoring" coverage under the four statutes to their original reach, as represented, the bill potentially does precisely what the framers of the initial legislation were careful to avoid: it "spread[s] the tentacles of the Federal Government to choke off all State activity." 110 Cong. Rec. 7059 (1964) (Sen. Pastore). Although there are many considerations that could restrain the courts from permitting the expansive application (see Part III, infra), the bill unnecessarily leaves to them the resolution of this vital issue.

B. Enforcement

1. Termination of funds

In addition to expanding the coverage of the nondiscrimination provisions, the bill makes significant changes in the standards of enforcement of the Act. As amended by the bill, the statute would allow compliance to be effected, as before, by fund termination,

> but such termination or refusal shall be limited in its effect to the particular assistance which supports such noncompliance so found, or . . . by any other means authorized by law.

S. 2568, § 5(b) (emphasis added).

Thus, the bill replaces the current language, limiting fund termination to "the particular program" in which noncompliance has been found, with new language limiting termination only to "the particular assistance which supports" noncompliance, ostensibly "retain[ing] the requirement that a nexus be established between the discrimination found and any federal funding . . . ." Cong. Rec. S4587 (Daily ed. Apr. 12, 1984) (joint explanation of Senators Kennedy and Packwood).

The sponsors have asserted that "[t]his bill does not change the enforcement structure and remedial tools available before Grove City raised questions about the statutes." Id. However, the ambiguous language of the amendments to the enforcement provision is subject to an interpretation that goes far beyond the enforcement scheme in place prior to Grove City. The new bill, by deleting the "particular program" language, could be construed to mean that "assistance which supports" discrimination encompasses all federal aid to an entity of which a subunit has violated the Act. That reading would deem any aid to the whole as "assisting" in the derelictions of the part, or conversely. Under this interpretation, discrimination by a single subunit or instrumentality of a state could result in termination of all federal aid to the state, including aid to its other subunits or instrumentalities not in violation. This broad potential for eliminating federal assistance programs would severely undermine the original intent of the program-specific limitation in Title VI, which "was not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs not tainted by discriminatory practices." Board of Public Instruction v. Finch, 414 F.2d 1068, 1075 (5th Cir. 1969) (emphasis by the court). Nor does this broad interpretation appear to be consistent with the overall context of the "assistance" phrase in the bill itself, the focus of which is on limiting, rather than expanding, the scope of funding termination as a sanction for noncompliance. Nevertheless, the bill does not specify in what respect a federal grant to one entity could be deemed to "assist" in discrimination committed by related entities and consequently implicate the vicarious termination requirement. 12/

On the one hand, the statements of the sponsors, 13/ indicating their intent to preserve the "pinpoint" approach of the enforcement scheme, would counsel against imparting the most expansive potential interpretation. On the other hand, these generalized statements might not persuade a court to limit the statutory language, because such a construction would tend to render the amendatory language nugatory. A court would be reluctant to construe a statutory amendment in a way that merely preserves the effect of the prior law. See Federal Ins. Co. v. Speight, 220 F. Supp. 90, 93 (E.D.S.C. 1963) ("The general rule is that a change in phraseology indicates persuasively, and raises a presumption, that a departure from the old law was intended . . . .").

The ambiguity of the bill on this critical question of the cutoff standard will present courts and administrative bodies with a difficult interpretative task, and will prevent

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12/ The term "assistance which supports" could also be read to authorize a narrower scope for termination than Title VI currently allows. Theoretically, a single grant program could be divided up into unaffected portions and portions used in discriminatory activities; only the latter segments of the grant would be terminated, rather than the entire program. This reading, although consistent with the language of the bill, is unlikely to prevail because it is contrary to the avowed intentions of the bill's sponsors to impart a broader coverage to Title VI. See, e.g., Cong. Rec. S4585 (Daily ed. Apr. 12, 1984) (joint explanation of Senators Kennedy and Packwood).

13/ See, e.g., Cong. Rec. S2487 (Daily ed. Apr. 12, 1984) (joint explanation of Senators Kennedy and Packwood) ("The bill also retains the requirement that a nexus be established between the discrimination found and any federal funding that is to be terminated or suspended by the administrative agency enforcing the law."); id. at S4595 (statement of Sen. Cranston) (bill "remains faithful to the original purpose of 'pinpointing').

beneficiaries of federal assistance from knowing the limits of the obligations and potential liabilities they have undertaken by receiving federal financial assistance. If the sponsors intend merely to retain the present law on this point, there is simply no need to change the operative language and thereby create such interpretative problems. If they wish to change it, it is unclear what the new language will require. There are much simpler and clearer means to reverse the Grove City decision without creating such uncertainty in the operative provisions of civil rights statutes that have been the subject of twenty years of judicial interpretation.

2. Other Enforcement Options

In addition to providing for termination of funds, Title VI provides that compliance may be effected "by any other means authorized by law." 42 U.S.C. § 2000d-1(2). Two types of "other" enforcement actions have developed under Title VI. The Department of Justice may seek injunctive relief against the offending agency. See Cong. Rec. S4586 (Daily ed. Apr. 12, 1984) (joint explanation of Senators Kennedy and Packwood). In addition, an injured person may bring suit against a grantee under a private cause of action. See Regents of the Univ. of California v. Bakke, 438 U.S. 265, 419-21 (1978) (opinion of Stevens, J.) (Title VI); Lau v. Nichols, 414 U.S. 563 (1974) (Title VI); Cannon v. University of Chicago, 441 U.S. 677, 709 (1979) (Title IX). Strictly speaking, the applicability of these enforcement alternatives does not appear to be limited by the program-specific language in the existing provision relating to fund terminations. Recently, however, the Supreme Court held that, because the existing description of prohibited conduct itself imposes a "program-specific" limitation, enforcement under the "other means" clause is coextensive with the authority to terminate funds, and thus is limited under existing law to the "particular program" that has violated the statute. North Haven Board of Education v. Bell, 456 U.S. 512, 538 (1982) (Title IX).

The bill has an effect on these private enforcement alternatives as well as the fund-termination authority. Because it removes the "program-specific" limitation both in the nondiscrimination mandate of § 601 and in the granting agencies' authority to issue enforcement regulations, enforcement action taken "by any other means authorized by law" would appear not to be limited to the particular program in which noncompliance was found. Thus, the Department of Justice could seek to enjoin the prohibited activity even though the granting agency might not have authority to terminate funds. The sponsors clearly intend to permit this discrepancy in the two modes of enforcement. See Cong. Rec. S4595 (Daily ed. Apr. 12, 1984) (statement of Sen. Cranston). Similarly, the private cause of action for individuals seeking injunctive relief would presumably remain as an available remedy against any entity encompassed by the nondiscrimination provision. See Cong. Rec. S4587 (Daily ed. Apr. 12, 1984) (joint explanation of Senators Kennedy and Packwood) (bill intended to preserve private rights of action).

III

ADMINISTRATIVE AND ENFORCEMENT PROBLEMS

Because of the broad coverage conferred by deleting the concept of program specificity and expansively defining "recipient," S. 2568 constitutes a qualitative reshaping and possible enlargement of federal civil rights jurisidiction. There are any number of examples that point up the bill's potentially expansive reach. The bill could be construed so that federal food stamp programs would subject participating supermarkets and local grocery stores to federal civil rights compliance reviews and complaint investigations. Pharmacies and drug stores that participate in medicare/medicaid programs could also be "recipients," as could the "transferee" of an individual's social security check who, upon acceptance of such payment, would have signed an open invitation to federal enforcers to enter and investigate. The sponsors do not appear to envision this result, see n.10, supra, but they have not tailored the language of the bill to protect against it.

State and local governments -- which under existing law are subject to coverage of the federal statutes only within their federally subsidized programs -- must, under the bill, defer to federal civil rights oversight of all their programs for their political subdivisions (funded and nonfunded) upon receipt by any one program of a federal dollar. For example, assume that a federal agency has proof that a city's police department discriminates on the basis of handicap in employment but receives no federal funds from the agency. However, the fire department, also a subunit of the city government, receives substantial agency funds for its operations. Provided that the city or state received "support," that would be a sufficient basis for coverage under S. 2568. And, while defunding of the fire department might not be an available remedy in such circumstances, the federal agency could refer the matter to the Department of Justice for litigation in injunctive proceedings against the police department because the city is a recipient of federal funds (as a consequence of one of its subunits' receipt of federal funds from which it derives support) and thus is prohibited in all of its subdivisions from discriminating on the basis of handicap by section 504. This result is different from court decisions and agency practice before the Grove City College decision. These four civil rights statutes have never been construed to provide authority for the Federal Government to regulate behavior in a unit of state or local government that received no federal funds.

There are, as well, serious enforcement problems raised by S. 2568. Agency regulations and paperwork requirements imposed under the four existing civil rights statutes are currently onerous in many respects. The bill, which would give all funding agencies authority -- indeed, the statutory responsibility -- to regulate all of the programs, activities, and subunits, will remove existing boundaries of agency jurisdiction to conduct compliance reviews and complaint investigations. The result, particularly for universities and state and local governments that typically receive funding from many agencies, would likely be multiple compliance reviews and reporting requirements. Complainants could file with several agencies, resulting in duplication of effort and inefficiency in the operation of federal civil rights enforcement. Further, because agencies would be statutorily responsible for the activities of its federally funded and unfunded components, agency expertise in the operation of programs and activities that they do fund would no longer promote the avoidance of inappropriate requirements.

For example, assume that a county water district receives a grant from the Environmental Protection Agency (EPA) to study the county's sewer needs. S. 2568 would appear to provide that all of the county's operations are subject to all four civil rights statutes because the federal financial assistance gives "support" to the county. Further assume that EPA received a complaint alleging discrimination in part of the county's operations that received no separate federal funds -- the county's road maintenance. Even though EPA has no knowledge or expertise in this area (it would fall within the province of the Department of Transportation), under the bill, EPA would presumably have the responsibility to deal with the allegation of discrimination. The federal government would lose a forceful tool -- the knowledge and expertise of those with specialized experience in the kind of discrimination involved.

There is no procedure contemplated by the bill for interagency referrals that might serve to alleviate the concern over inexpert or duplicative agency complaint investigations. Nor is it clear, even under some agency referral systems, how the fund termination provision would operate if the discriminatory activity existed in a nonfunded component, as investigated by a referral agency, and there developed a disagreement as to whether the federal funds "supported noncompliance." No attention appears to have been given to this set of complexities.

IV

CONSTITUTIONAL CONSIDERATIONS

In addition to the significant policy issues raised by the potentially expansive change in the law under S. 2568 as discussed above, the amendments may raise constitutional questions with respect to Congress' power to impose such requirements, and whether these requirements may be imposed on the states. Three possible sources of federal power are arguably available to support this legislation. First, the commerce power, U.S. Const. Art. I, § 8 cl. 3, could be relied upon for the imposition of nondiscrimination obligations on certain private entities. See Heart of Atlanta Motel v. United States, 379 U.S. 241, 261 (1964) (Title II of the Civil Rights Act of 1964, prohibiting discrimination in public accommodations, is valid exercise of commerce power).

Application of coercive responsibilities on the states through the commerce power, however, is limited by the effect of the Tenth Amendment. 14/ See National League of Cities v.

14/ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X.

Usery, 426 U.S. 833, 852 (1976) (federal government may not regulate the states as states to impair their ability to structure integral operations in areas of traditional governmental functions). But see EEOC v. Wyoming, 103 S. Ct. 1054, 1064 (1983) (application of Age Discrimination in Employment Act to states under commerce power did not violate Tenth Amendment in context presented). If this legislation is to avoid the constraints of the Tenth Amendment, two alternative sources of federal power exist: the power to impose conditions on expenditures of funds pursuant to the Spending Clause 15/ and § 5 of the Fourteenth Amendment. 16/

When the source of legislative power is not articulated by Congress and could be either the Spending Clause or § 5, the Supreme Court generally looks to the type of obligations sought to be imposed by the legislation. If the claimed obligations involve affirmative financial outlays by the states, the Court will be less willing to infer that the power derives from § 5 and more likely to infer spending power authority, "since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981) (Pennhurst I). 17/

15/ U.S. Const. Art. I, § 8, cl. 1.

16/ The Fourteenth Amendment provides, in part, that no state may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 5 authorizes Congress "to enforce, by appropriate legislation," its provisions.

17/ This approach to determining the source of constitutional authority for federal legislation could create distinctions among the four civil rights statutes under consideration, depending on the claims raised in a particular case. The dispositive criterion would be whether the claimant sought merely to enforce prohibitory obligations or instead attempted to impose affirmative duties upon a recipient of federal aid. The extent to which the four statutes require affirmative steps has not been clearly resolved. See Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979) (college not required by § 504 to make affirmative efforts to overcome disabilities caused by handicaps). But see 45 C.F.R. § 84.44 (1983) (under § 504 recipient must provide necessary "auxiliary aids" to handicapped).

A. The Spending Clause

The Supreme Court has long recognized that Congress may fix the conditions upon which it disburses federal funds to the states. Pennhurst I, 451 U.S. at 17. There are, however, limits on the power to impose such conditions. Id. Although the Court has never defined those limits, its use of spending power analysis to construe statutes passed under authority of that power sheds some light on the general contours of this type of legislation.

In Pennhurst I, the Court considered a statutory question involving the Developmentally Disabled Assistance and Bill of Rights Act ("Disabled Assistance Act"), a voluntary program whereby the Federal Government provides assistance to states to aid them in treating the mentally retarded. The issue before the Court was whether the Disabled Assistance Act created any substantive rights on behalf of the mentally retarded to particular types of treatment and, if so, whether Congress, which had not articulated its source of authority, could impose these obligations on the states either under its spending power or under § 5 of the Fourteenth Amendment. The Court approached the question of power first, considering the scope of the spending power in order to determine what rights Congress had intended to create under the Act. The Court explained the principles of spending power analysis:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal money, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17 (citations and footnote omitted).

The Court approached this question in Pennhurst I, not in the context of the limits on Congress's power under the Spending Clause, but rather by attempting to determine whether Congress had intended to impose certain affirmative financial obligations upon state participants in the program to realize social benefits that the Act sought to achieve. Ambiguous statutory language and legislative history in the Disabled Assistance Act persuaded the Court that Congress could not have intended to use its spending power in a way that would impose affirmative obligations on recipient states without clear notice. Id. at 27. 18/ Thus while Congress has broad power to place conditions upon funds expended under the Spending Clause, Pennhurst I stands for the proposition that legislation must clearly notify states accepting federal financial assistance that they are thereby incurring additional obligations. The Court declined to attribute to Congress an intent to impose significant financial obligations on the states without adequate notice. As in contract theory, the recipient must have the option to terminate or refuse a grant rather than assume the concomitant burdens. Guardians Ass'n v. Civil Service Comm'n of the City of New York, 103 S. Ct. 3221, 3229 (1983); Fullilove v. Klutznick, 448 U.S. 448, 474 (1980); Rosado v. Wyman, 397 U.S. 397, 420-21 (1970).

This construction of the spending power avoids the limitations of the Tenth Amendment, which apply with full force to Congress's power under the Commerce Clause. Because the State has a choice whether to accept a condition attached to federal funding, its sovereignty is not threatened as it is in certain mandatory applications of Congress's commerce power. This voluntary, knowing decision of a state to exchange burdens for benefits, at least in theory, preserves the autonomy of state governance and avoids the threat of federal coercion. See Steward Machine Co. v. Davis, 301 U.S. 548, 589 (1937) (rejecting Tenth Amendment challenge to federal social security tax law because state unable to claim duress);

18/ The Court reasoned further that since no provision in the Act authorized termination of funds for violation of the specific right claimed, affirmative accommodation of that right "can hardly be considered a 'condition' of the grant of federal funds." 141 U.S. at 23.

cf. National League of Cities v. Usery, 426 U.S, 833, 852 n.17 (1976) (expressing no view as to whether Tenth Amendment would pose an impediment to exercises of spending power); Coyle v. Oklahoma, 221 U.S. 559, 568 (1911) (under power to admit states to the union, Congress may impose terms and conditions but may not deprive a state of essential attributes).

An examination of S. 2568 in light of these principles discloses that the bill purports to set out the conditions under which a state will be deemed to have accepted the nondiscrimination obligations of the four civil rights statutes. If a state "receives support" from the federal money granted to it or to its subunit, then it must comply with the statutory mandates. (See pp. 6-8 supra.) Under a number of circumstances, it seems apparent that a state could not successfully claim that it was unaware of the intended effect of the bill, nor would a court have difficulty in such situations in determining that notice was adequate to ensure that the Spending Clause was properly invoked. Thus, for example, in a situation such as that involved in the Grove City case, an institution would be characterized as a "recipient" on account of aid to one of its departments, and could not successfully claim that it was unaware that the entire institution would be rendered subject to the Act through receipt of federal funding by a single department. This reading is consistent with both the language of the bill and the statements of its sponsors.

Different considerations might arise, however, if a state were charged with the responsibilities of the nondiscrimination statutes as a result of federal aid to a discrete state component. Substantial uncertainty exists, for example, as to whether a federal research grant to a state university science facility would necessarily subject each and every other activity of the state or any of its subunits, no matter how remote in funding or activities, to statutory coverage. Assuming no other federal aid, the obligations and liabilities of the state's police department, legislature, or health clinics would depend on the extent to which the state could be said to "receive support" from the federal research grant. The bill does not provide a standard for determining this significant issue, nor does it clearly articulate the choices the state is making when it accepts the federal funds.

Clear notice to a state indicating the extent of the responsibilities it agrees to incur by accepting federal aid, therefore, might be absent in some circumstances, depending on the basis asserted for a claim that the state was covered by the statute. We believe that the bill is susceptible to certain applications that would not meet the notice standard articulated in Pennhurst I.

A challenge to the bill on this ground is unlikely to arise as a facial attack on the constitutionality of Congress's exercise of its spending power. Rather, it is more likely that a court would be asked to determine whether, under a specific set of facts, Congress had intended the ambiguous language to require that an entire state be covered by the statutes as a result of isolated federal assistance programs. As in Pennhurst I, the Court would tend to construe the statutes narrowly enough that they would not exceed the heretofore undefined limits of the spending power. See Lau v. Nichols, 414 U.S. 563, 569 (1974) ("whatever may be the limits" of the spending power, Title VI does not exceed them).

Only through a continuous process of judicial interpretation and reinterpretation could this legislation as presently drafted eventually develop meaningful contours of the type envisioned by the Court in Pennhurst I. Thus, while we do not believe that the ambiguity would necessarily require invalidation of any part of the amendments, we are concerned that considerable uncertainty would result with regard to the coverage of the four statutes affected by this bill. Although the statements of the sponsors of S. 2568 do not appear to recognize that the definition of "recipient" could extend statutory coverage far beyond the contours of a single institution and the Grove City facts, the language is broad enough to subject an entire state and all of its subunits to coverage if the state, or any of its subunits, receives any federal assistance. Evidently the sponsors either do not perceive or do not wish to emphasize the bill's amenability to this construction. Yet, the meaning of the "receives support" limitation -- if indeed it is a limitation -- is nowhere articulated. We believe that the amendments should be refined to achieve greater precision and to avoid unnecessary litigation and resultant confusion.

B. Section 5 of the Fourteenth Amendment

A possible alternative source of federal power to enact S. 2568, one which would surely be cited by litigants as additional support for the legislation, particularly if Tenth Amendment or Spending Clause limitations were raised, is § 5 of the Fourteenth Amendment. That section grants Congress the power to enforce, by appropriate legislation, the provisions of the Fourteenth Amendment.

On the one hand, reliance on § 5 would give Congress broad power to impose affirmative obligations on the states if the legislation fell within the purview of that grant of authority. Section 5 legislation is restricted neither by the voluntariness requirements of spending power conditions, nor by the Tenth Amendment restraint on interference with state sovereignty. EEOC v. Wyoming, 103 S. Ct. 1054, 1064 n.18 (1983); City of Rome v. United States, 446 U.S. 156, 179 (1980); cf. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (Eleventh Amendment). "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power." Ex parte Virginia, 100 U.S. 339, 346 (1880).

On the other hand, two considerations make it unlikely that all aspects of S. 2568 would be upheld as exercises of § 5. The considerations relate, generally, to two issues: (1) whether Congress intended to exercise § 5 power, a statutory question, and (2) whether § 5 in fact authorizes the particular exercise of power represented by S. 2568, a constitutional question. As to the first consideration, Congress has not specifically invoked § 5 as authority to enforce the Fourteenth Amendment in S. 2568. The Supreme Court indicated in Pennhurst I that it will not lightly infer a congressional intent to use § 5 to impose affirmative obligations on the States, although prohibitory legislation would be more susceptible to such an inference. 451 U.S. at 16, 17. The language of § 601 and its counterparts is facially prohibitory, but compliance with the prohibitions of some of the four statutes may require substantial outlays of state funds. 19/ Thus a court would be

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19/ For example, § 504 can require a covered entity to take some steps to provide auxiliary aids, including personnel and equipment, to handicapped persons. See 45 C.F.R § 84.44 (1983).

unlikely to impute § 5 authority to such statutes unless Congress expressly invoked it. "Because such legislation [under § 5] imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." Pennhurst I, 451 U.S. at 16.

As to the second consideration, it is unclear whether § 5 would support the sweeping requirements of the four nondiscrimination statutes even if it were explicitly invoked. The limits of what may be the subject of "appropriate legislation" under § 5 have not been defined by the Court. See Pennhurst I, 451 U.S. at 16 n.12. The Court has extended to § 5 cases the test of McCulloch v. Maryland, 17 U.S. 315, 420 (1819), under which a statute passed under § 5 must be "plainly adapted" to the end of enforcing the Fourteenth Amendment and consistent with "the letter and spirit of the Constitution." Katzenbach v. Morgan, 384 U.S. 647, 651 (1966). The Court has construed broadly Congress's exercise of § 5 powers to impose requirements beyond those mandated by the Fourteenth Amendment itself, but to date such expansive readings of the § 5 powers have been accorded primarily in the area of race discrimination. See Fullilove v. Klutznick, 448 U.S. 448 (1980); City of Rome, 446 U.S. at 177.

However, the breadth of Congress's power under § 5 is an area which the Supreme Court has not fully explored. In particular, it is unsettled how much latitude Congress has to determine the substantive content of Fourteenth Amendment rights in the course of deciding what "rights" are appropriate to enforce pursuant to § 5. Thus it is not clear to what extent or in what circumstances Congress can modify or expand Fourteenth Amendment rights by statute, either on the basis of legislative findings of fact or as a matter of "resolution of competing values and a delineation of substantive constitutional rights by Congress rather than the Court." 20/

The Court has not yet applied the deferential standard accorded legislation involving race discrimination outside the area of race, the principal target of the Civil War Amendments. This question sharply divided the Court in

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20/ G. Gunther, Constitutional Law 1086 (10th ed. 1980).

Oregon v. Mitchell, 400 U.S. 112 (1970). In that case, the Court upheld Congress's § 5 authority to ban literacy tests in state voting based upon evidence of raciallly discriminatory effects, but it struck down Congress's attempt under § 5 to require states to permit the 18-year-old vote in state elections. Some members of the Court evidently believed that legislation outside the area of racial discrimination cannot be accomplished under § 5, id. at 130 (Opinion of Black, J.); id. at 212 (Opinion of Harlan, J.); id. at 293 (Opinion of Stewart, J., with Burger, C.J. and Blackmun, J.), while others apparently believed that all principles of equality may be enforced under § 5. Id. at 143 (Opinion of Douglas, J.); id. at 240 (Opinion of Brennan, White, and Marshall, JJ.). More recently, the Court declined an opportunity to decide whether the Age Discrimination in Employment Act (ADEA) could be upheld as a valid exercise of § 5 powers. EEOC v. Wyoming, 103 S. Ct. at 1064. Four justices, in dissent, expressed the view that § 5 could not provide the basis for Congress's extension of the ADEA to the states. Id. at 1068 (Burger, C.J., with Powell, Rehnquist, and O'Connor, JJ., dissenting). 21/

Title VI has the strongest claim to validity under § 5 because it focuses on racial discrimination. Title IX, the ADA and § 504 stand on more tenuous footing in this respect, since they arguably reach beyond the mandates of the Constitution in protecting classes of persons heretofore not judicially recognized as entitled, as a class, to the protections afforded by the Fourteenth Amendment to victims of racial discrimination. Consequently, it is much more likely that at least these three statutes would be analyzed under the Spending Clause rather than as exercises of congressional power under § 5. If so, the courts might well attempt to construe these statutes as applicable only in those instances where they may be perceived as providing sufficiently clear notice to constitute a valid imposition of conditions upon the acceptance of federal funds under the Spending Clause. However, this task should properly be undertaken in the first instance by the legislators.

21/ The Chief Justice appears to have taken the position that the Court must declare a class to be constitutionally protected before Congress can exercise whatever § 5 power it may have vis-a-vis the states. 103 S. Ct. at 1074 n.7.

V

ALTERNATIVES TO S. 2568 AND H.R. 5490

To the extent that the legislative objective is limited to removing the restraints found by the Court to have been written into present law in the Grove City decision, proponents might wish to consider alternative amendments which would reverse that decision without tampering with an otherwise effective and successful statutory scheme. Each possible alternative may raise its own set of issues to be considered carefully by the Congress, and because of the importance of any modification in these civil rights statutes, any proposed change deserves to be subjected to the full rigors of the committee hearing process, to provide an opportunity to develop fully its strengths and weaknesses, and to create a useful legislative history. One possibility for attaining the stated objective of reversing the Grove City decision through less drastic changes in the existing civil rights statutes would be the Schneider bill, H.R. 5011, currently before Congress, which would extend Title IX coverage to educational institutions as well as to "programs and activities." Indeed, Congress might well wish to consider expanding H.R. 5011 so that its institution-wide coverage pertains to discrimination on account of race, age, and handicap, as well as, on account of sex. Alternatively, an amendment to S. 2568 and H.R. 5490 could go far toward avoiding at least some of the difficulties outlined in this report. The Department of Justice stands ready to work with the Committee to devise language that will fully meet Congress's stated purpose while avoiding the sort of coverage, administrative and enforcement problems discussed above.

VI

CONCLUSION

Our review of the foreseeable effects of S. 2568 leads us to conclude that the sweeping scope of the language proposed in the bill might well have much broader application than simply the reversal of the Grove City decision. We believe the consequences of the serious ambiguities in the bill and their constitutional implications, discussed above, have not been adequately considered by Congress or accurately reflected in the introductory statements of the bill's sponsors. The perhaps unintended ramifications of the bill are certain, at best, to create confusion in recipients, agencies, and courts.

At worst, they may include impermissible interference with important state prerogatives or lead to adverse judicial decisions as to their enforceability.

Sincerely,

Robert A. McConnell

Robert A. McConnell
Assistant Attorney General
Office of Legislative and
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APPENDIX

STATUTES AS AMENDED BY S. 2568 AND H.R. 5490 *

TITLE IX

EDUCATION AMENDMENTS OF 1972, § 901; 20 U.S.C. § 1681

§ 1681

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation [in], be denied [the] benefits [of], or be subjected to discrimination [under any education program or activity receiving] by any education recipient of Federal financial assistance, except that:

* * * * *

(c) "Educational institution" defined

* * * * *

(2) [NEW] For the purpose of this title, the term 'recipient' means--

(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.

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* New language is designated by underscoring or by "NEW;" portions that the bill would delete are in brackets.

§ 1682

Each Federal department and agency which is empowered to extend Federal financial assistance [to any] for education [program or activity], by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to [such program or activity] recipients by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance [under such program or activity] to any recipient as to [whom] which there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to [whom] which such a finding has been made, and shall be limited in its effect to the particular [program, or part thereof, in which] assistance which supports such noncompliance [has been] so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

REHABILITATION ACT OF 1973, § 504, 29 U.S.C. § 794

§ 794

(a) No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of [his] such individual's handicap, be excluded from the participation [in], be denied [the] benefits [of], or be subjected to discrimination [under any program or activity receiving] by any recipient of Federal financial assistance.

(b) [NEW] For the purpose of this section, the term 'recipient' means--

(1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

(2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.

AGE DISCRIMINATION ACT OF 1975, § 302; 42 U.S.C. § 6101

§ 6101

It is the purpose of this chapter to prohibit discrimination on the basis of age [in programs or activities receiving] by recipients of Federal financial assistance, including [programs or activities receiving funds under the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221 et seq.)] recipients of funds under chapter 67 of title 31, United States Code.

§ 6102

Pursuant to regulations prescribed under section 6103 of this title, and except as provided by section 6103(b) and section 6103(c) of this title, no person in the United States shall, on the basis of age, be excluded from participation [in], be denied [the] benefits [of], or be subjected to discrimination [under, any program or activity receiving] by any recipient of Federal financial assistance.

§ 6103

* * * * *

(b) Nonviolative actions

(1) It shall not be a violation of any provision of this chapter, or of any regulation issued under this chapter, for any person to take any action otherwise prohibited by the provisions of section 6102 of this title if [, in the program or activity involved]--

(A) such action reasonably takes into account age as a factor necessary to the normal operations of the recipient or the achievement of any statutory objective [of such program or activity] in furtherance of which the Federal financial assistance is used; or

* * * * *

(c) Employment practices

(1) Except with respect to [any program or activity receiving] Federal financial assistance for public service employment under the Comprehensive Employment and Training Act of 1974 (29 U.S.C. 801 et seq.) as amended, nothing in this chapter shall be construed to authorize action under this chapter by any Federal department or agency with respect to any employment practice of any employer, employment agency, or labor organization, or with respect to any labor-management joint apprenticeship training program.

* * * * *

§ 1604

(a) Methods of achieving compliance with regulations

The head of any Federal department or agency who prescribes regulations under section 6103 of this title may seek to achieve compliance with any such regulation--

(1) by terminating, or refusing to grant or to continue, assistance [under the program or activity involved] to any recipient with respect to whom there has been an express finding on the record, after reasonable notice and opportunity for hearing, of a failure to comply with any such regulation; or

(2) by any other means authorized by law.

(b) Limitations on termination

Any termination of, or refusal to grant or to continue, assistance under subsection (a)(1) of this section shall be limited to the particular political entity or other recipient with respect to which a finding has been made under subsection (a)(1) if this section. Any such termination or refusal shall be limited in its effect to [the particular program or activity, or part of such program or activity, with respect to which such funding has been made] assistance which supports the noncompliance so found. No such termination or refusal shall be based in whole or in part on any finding with respect to any [program or activity] noncompliance which [does] is not [receive Federal financial] supported by such assistance. Whenever the head of any Federal department or agency who prescribes regulations under section 6103 of this title withholds funds pursuant to subsection (a) of this section, he may, in accordance with regulations he shall prescribe, disburse the funds so withheld directly to any public or nonprofit private organization or agency, or State or political subdivision thereof, which demonstrates the ability to achieve the goals of the Federal statute authorizing the program or activity while complying with regulations issued under section 6103 of this title.

(e) Injunctions

(1) When any interested person brings an action in any United States district court for the district in which the defendant is found or transacts business to enjoin a violation of this [Act by any program or activity receiving Federal financial assisstance] title, such interested person shall give notice by registered mail not less than 30 days prior to the commencement of that action to the Secretary of Health and Human Services, the Attorney General of the United States, and the person against whom the action is directed.

* * * * *

§ 6107

For purposes of this chapter--

* * * * *

(4) [NEW] the term 'recipient' means--

(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.

TITLE VI

CIVIL RIGHTS ACT OF 1964, § 601; 42 U.S.C. § 2000d

§ 2000d

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation [in], be denied [the] benefits [of], or be subjected to discrimination [under any program or activity receiving] by any recipient of Federal financial assistance.

§ 2000d-1

Each Federal department and agency which is empowered to extend Federal financial assistance to any [program or activity] recipient, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such [program or activity] recipient by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance [under such program or activity] to any recipient as to [whom] which there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to [whom] which such a finding has been made and, shall be limited in its effect to the particular [program, or part thereof, in which such noncompliance has been] assistance which supports such noncompliance so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action, terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

§ 2000d-6 [NEW]

For the purpose of this title, the term 'recipient' means--

(1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and
(2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,
to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.

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June 14, 1984

Honorable Jake Garn
United States Senate
Washington, D.C. 20510

RE: WHAT THE CIVIL RIGHTS ACT OF 1984 (S. 2568)
MAY MEAN FOR THE PRIVATE SECTOR

Dear Senator Garn:

A member of your staff has asked the Policy Committee for an analysis of S. 2568, the Civil Rights Act of 1984. The enormity of the subject precludes a comprehensive analysis, particularly in the time available. (The bill was introduced April 12, 1984 (together with its companion bill, H.R. 5490), and has already been favorably reported by two House committees. Mark-up in the Senate Committee on Labor and Human Resources is expected this month.)

This analysis, therefore, focuses on S. 2568's potential impact on the private sector. Regulation of private activities raises profound and intricate questions of public policy, and such questions are bountiful in this bill. Further, claims and counterclaims about the bill's effects on segments of the private sector—from merchants and farmers to bankers, educators, and landlords—are a knot of contradictions. Our analysis is limited to the private sector because that is where we have found the most interest and anxiety.

I. THE INTERRELATIONSHIP OF THE STATUTES

Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, et seq., Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681, et seq., Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, and the Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101, et seq., each prohibit discrimination in "any program or activity receiving federal financial assistance." Respectively, the statutes prohibit discrimination on the basis of "race, color, or national origin," "sex," "handicap" ("otherwise qualified handicapped individual"), and "age." Title IX is limited to education programs.

Title VI, which is the model for the later enactments, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or

> activity receiving Federal financial assistance.
> 42 U.S.C. 2000d (1976).

The courts have consistently held that the statutes are interrelated—that comparable language evidences a common meaning and intent. A judicial construction of one statute is often used to interpret another. See, e.g., Northcross v. Bd. of Education, 412 U.S. 427, 428 (1973).

In the Grove City case, infra, the Supreme Court construed the "program or activity" language of Title IX. This authoritative interpretation of Title IX is likely to control Title VI, Section 504, and Age Discrimination Act (ADA) cases as well, although we can only speculate on the precise effects.

II. THE GROVE CITY CASE

Grove City is a private, coeducational, liberal arts college located in Pennsylvania. It describes itself as having "both a Christian world view and a freedom philosophy" and it maintains that these positions are "interrelated."

At the time of the lawsuit, Grove City had about 2200 students. About 140 students were receiving Basic Educational Opportunity Grants (BEOGs) and about 340 students had Guaranteed Student Loans (GSLs). The grants were made directly to the students (the grants were not funneled through the college) through the Department of Education's (ED's) Alternate Disbursement Systems (ADS). (Institutions participating in ADS must make certain certifications to ED, but the Department itself calculates the awards and makes disbursements directly to eligible students. ED also operates the Regular Disbursement System (RDS). Under RDS, ED estimates the amount of money that an institution will need for grants and advances that sum to the institution, which then selects recipients, calculates the amount of the grants, and disburses the funds.) Student loans are guaranteed by the federal government.

"Apart from this indirect assistance, Grove City has followed an unbending policy of refusing all forms of government assistance, whether federal, state or local. It was and is the policy of this small college to remain wholly independent of government assistance, recognizing—as this case well illustrates—that with acceptance of such assistance one surrenders a certain measure of the freedom that Americans always have cherished." Grove City College v. Bell, — U.S. —, 104 S. Ct. 1211, 1223 (1984) (Powell, J., concurring).

ED concluded that Grove City was a "recipient" of "Federal financial assistance" as those terms are defined by Title IX's regulations, 34 CFR Part 106. Grove City was informed that as a recipient it must execute an Assurance of Compliance form. Grove City refused to execute the document, and ED began administrative proceedings which resulted in an order terminating assistance to Grove City's students. The Administrative Law Judge concluded that student grants and loans constituted indirect federal financial assistance to Grove City.

The Administrative Law Judge also found that, "[T]here is not the slightest hint of any failure to comply with Title IX, save the failure to submit [the compliance form]. This refusal is obviously a matter of conscience and belief." Id. at 1224.

The District Court

Following the adverse administrative ruling, Grove City and four of its students commenced an action in federal district court. The district court held that the BEOGs were federal financial assistance, but it refused on several grounds to terminate the students' aid. Grove City College v. Harris, 500 F. Supp. 253 (1980).

Interestingly, ED had sought to terminate the students' BEOGs and their GSLs. The district court held that GSLs were "contract[s] of insurance or guaranty" that could not be terminated because of the express exclusion of such contracts under sec. 902 of Title IX. ED did not challenge this conclusion on appeal. However, ED's initial attempt to have GSLs declared "Federal financial aid" has important implications that will be discussed below. (Note that between the district court decision and the appellate court decision there was a change of national administration. See also, 104 S. Ct., at 1216 n. 10.)

The Court of Appeals

The court of appeals reversed. 687 F.2d 684 (3rd Circ. 1982). The court held that Title IX was triggered by indirect as well as direct aid and that ED could withhold grants from Grove City's students, despite the fact that Grove City had never discriminated. The appeals court recognized that Title IX is program specific, but held that the entire institution is the program:

> Where the federal government furnishes indirect or non-earmarked aid to an institution, it is apparent to us that the institution itself must be the "program." Were it otherwise, and if it had to be demonstrated that each individual component of an integrated educational institution had in fact received the particular monies for a particular purpose, no termination sanction could ever effectively be imposed.

Id. at 700.

The Supreme Court

The Supreme Court held that Grove City, through its students who receive BEOGs, is a recipient of federal funds:

> The linchpin of Grove City's argument that none of its programs receives any federal assistance is a perceived distinction between direct and indirect aid, a distinction that finds no support in the text of section 901(a).

104 S. Ct., at 1217.

> [W]e have little trouble concluding that Title IX coverage is not foreclosed because federal funds are granted to Grove City's students rather than directly to one of the College's educational programs.

104 S. Ct., at 1220.

The Court also held that ED could terminate the BEOGs if Grove City failed to execute the Assurance of Compliance. Termination need not be preceded by a finding of discrimination. Id. at 1222.

Grove City's First Amendment defense was summarily rejected. Id. at 1223.

The Court was unanimous in each of the holdings above.

Six members of the court held that Title IX is indeed program specific, and that "program" does not mean an entire school:

> We conclude that the receipt of BEOGs by some of Grove City's students does not trigger institution-wide coverage under Title IX. In purpose and effect, BEOGs represent federal financial assistance to the College's own financial aid program, and it is that program that may properly be regulated under Title IX.

Id. at 1222.

The reasoning of the majority's opinion is noteworthy:

> To the extent that the Court of Appeals' holding . . . rests on the possibility that federal funds received by one program or activity free up the College's own resources for use elsewhere, the Court of Appeals' reasoning is doubly flawed. First, there is no evidence that the federal aid received by Grove City's students results in the diversion of funds from the College's own financial aid program to other areas within the institution. Second, and more important, the Court of Appeals' assumption that Title IX applies to programs receiving a larger share of a school's own limited resources as a result of federal assistance earmarked for use elsewhere within the institution is

> inconsistent with the program-specific nature of the statute. Most federal educational assistance has economic ripple effects throughout the aided institution, and it would be difficult, if not impossible, to determine which programs or activities derive such benefits. Under the Court of Appeals' theory, an entire school would be subject to Title IX merely because one of its students received a small BEOG or because one of its departments received an earmarked federal grant. This result cannot be squared with Congress' intent.

Id. at 1221 (White, J., writing for the majority).

It is precisely this result that S. 2568 will reverse.

If S. 2568 is enacted, an entire school will be subject to Title IX merely because one of its students receives a small BEOG or because one of its departments receives an earmarked federal grant.

The Grove City majority addressed itself to a recurring question in the debate about S. 2568: Can a line be drawn between BEOGs, for example, and food stamps and similar benefits? Said the court:

> Grove City's attempt to analogize BEOGs to food stamps, Social Security benefits, welfare payments, and other forms of general-purpose governmental assistance to low-income families is unavailing. First, there is no evidence that Congress intended the receipt of federal money in this manner to trigger coverage under Title IX. Second, these general assistance programs, unlike student aid programs, were not designed to assist colleges and universities. Third, educational institutions have no control over, and indeed perhaps no knowledge of, whether they ultimately received federal funds made available to individuals under general assistance programs, but they remain free to opt out of federal student assistance programs. Fourth, individuals' eligibility for general assistance is not tied to attendance at an educational institution.

Id. at 1218 n. 13.

The court also said, "Student financial aid programs, we believe, are sui generis." Id. at 1221.

The court's four-part test, as useful as it is, cannot answer many of the questions that S. 2568 raises. To begin with, S. 2568 will introduce new legislative history and new statutory language. This new language treats "indirect recipients" and "ultimate beneficiaries," for just two examples, more expansively than did the old language. Second, many of the questions raised by S. 2568 do not concern food stamps, Social Security, and similar programs. Part VI of this letter discusses ten areas of the private sector that may feel the effects of S. 2568. Not one of these areas involves a food stamp recipient or a Social Security beneficiary. Third, since student aid programs are *sui generis*, the test may also be unique. Fourth, the court's formula depends on the particular facts and purposes of the federal financial aid. In *Grove City*, by means of the four-part test, the court was able to differentiate special-purpose aid (BEOGs) from general-purpose governmental assistance. Using the same test, but applying it to different special-purpose programs (airport construction assistance, research grants, on-the-job-training programs, etc.) which have their own facts and legislative history that will be augmented by the language and legislative history of S. 2568, a different result may be reached.

III. S. 2568

Senators Kennedy and Packwood introduced S. 2568 on April 12, 1984. It was referred to the Senate Committee on Labor and Human Resources. There has been one day of hearings in a Labor subcommittee, and two days of hearings in a Judiciary subcommittee. This week, the Agriculture Committee considered its application to the farming community. The full Labor Committee may mark-up the bill this month. S. 2568 has more than 60 cosponsors.

In the House, the companion bill (H.R. 5490) was jointly referred to the Judiciary Committee and the Education and Labor Committee. Joint hearings were held and both committees have, by unanimous votes and without amendment, ordered the bill reported. As this letter is being written, the reports are not available.

The most authoritative guide to the purposes of S. 2568 (other than the bill itself, which is not here ignored, see below) is a "Joint Explanation by Senator Kennedy and Senator Packwood of Civil Rights Act of 1984," 130 Cong. Rec. S 4585-87 (daily ed. April 12, 1984) [hereinafter cited as "Joint Explanation"]. The quotation below is from the "Joint Explanation" and titled, "What the Bill Does":

> This bill makes three limited changes designed to restore Title IX, Title VI, Section 504, and the ADA to their intended force and coverage. Congress always intended that these crosscutting antidiscrimination statutes, and the various other federal funding statutes which contain additional prohibitions on discrimination in the particular federally assisted programs or activities created by each law, be interpreted to have broad coverage. The changes in all four laws are consistent, to preserve the existing

> parallels among them.
>
> First, the general prohibition language in each statute is modified to delete "program or activity" and substitute the term "recipient." The effect of this change is to prohibit an entire institution or entity from discriminating if any of its parts receives federal funds. With respect to Title IX, the limitation to education is retained.
>
> Second, a definition of the term "recipient" is added to the four statutes. This definition is modeled on the definition currently contained in the regulations issued under these laws. These statutes have consistently been interpreted to exempt from coverage as "recipients" the landlord whose tenant pays the rent with federal public assistance funds, the clothing store that is paid for a shirt with money from a Social Security check, and others similarly situated. This bill makes no change in this regard.
>
> Third, the enforcement section of each of the laws is modified to delete "program or activity" language. . . .

Id. at S 4586.

The third purpose of the bill, modification of the enforcement mechanisms, will not be analyzed in this letter.

Nor will this letter dispute the frequent claim that S. 2568 "restore[s]" the statutory "force and coverage [that] Congress always intended," although this claim is doubtful. As measured by the constructions of the federal courts, Congress's intent seems to have been for the phrase "program or activity" to mean program or activity, not institution. See, e.g., Grove City College v. Bell, supra (sex discrimination); N. Haven Bd. of Ed. v. Bell, 456 U.S. 512 (1982) (sex discrimination); Hillsdale College v. Dept. of Health, Education and Welfare, 696 F.2d 418 (6th Cir.1982), vacated and remanded in light of Grove City, 52 U.S.L.W. 3700 (U.S. Mar. 26, 1984) (sex discrimination); Rice v. President & Fellows of Harvard Coll., 663 F.2d 336 (1st Cir.1981), cert. denied, 456 U.S. 928 (1982) (sex discrimination); Bd. of Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir.1969) (race discrimination); and Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir.1980) (handicap discrimination). The cited cases all teach that the relevant statutory language is indeed program specific. See also, the unsuccessful amendment of Senator Bayh, no. 398 (requiring institution-wide coverage), 117 Cong. Rec. 30156 (1971). The unsuccessful 1971 amendment was of course succeeded by the successful 1972 amendment, the program-specific Title IX.

"Recipients" Under S. 2568

For each of the four statutes, S. 2568 proposes to omit "program or activity" language and replace it with language broad enough to wholly encompass any recipient. For example, section 3(a) of the bill will produce the following changes in Section 504, (and the three other statutes are changed similarly) [Omit the language that is in brackets and insert the language that is underlined]:

> [29 U.S.C. 794] (a) No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of [his] such individual's handicap, be excluded from the participation [in], be denied [the] benefits [of], or be subjected to discrimination [under any program or activity receiving] by any recipient of Federal financial assistance or [under any program or activity conducted] by any Executive agency or by the United States Postal Service. . . .

There is very little dispute about the meaning of the proposed changes from "program or activity" to "recipient." Some think the change is unwise, or that it needs redrafting to solve this or that problem, but its meaning is relatively clear: It will mean at least that "an entire school would be subject to Title IX merely because one of its students received a small BEOG or because one of its departments received an earmarked federal grant." 104 S. Ct., at 1221.

There are other changes that S. 2568 proposes to make that are not so clear.

For each of the four statutes, S. 2568 proposes to define "recipient" within the statute itself. Until now, "recipients" have been defined only in the regulations. S. 2568 proposes a uniform definition of "recipient" for each of the four statutes although the regulatory definitions have differed somewhat. S. 2568 proposes:

> (b) For the purpose of this section, the term "recipient" means—
> (1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization or entity), and
> (2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit, to which Federal financial assistance is extended (directly or through another entity or a

person), or which receives support from the extension of Federal financial assistance to any of its subunits.
S. 2568, 98th Cong., 2d Sess., sec. 3(b) (1984). See also, S. 2568's secs. 2(b), 4(e)(3), and 5(c) which differ slightly only in the words preceding "'recipient' means--".

Note that "recipient" includes "any . . . private agency, institution, or organization" which receives federal support, directly or indirectly. (Emphasis added.) S. 2568's effects on private institutions are the theme of this memorandum.

IV. ADMINISTRATIVE AND CONGRESSIONAL DEFINITIONS ARE NOT INTERCHANGEABLE

It is incorrect to assume that there would be no juridical changes even if S. 2568's proposed statutory definition were identical to the existing administrative definitions. The same words, when uttered by different authority, do not have the same meaning. Judges know the difference between administrative words and words that Congress has passed and the President has signed. A court has substantially more authority to invalidate or restrict regulations than to narrow or void a statute.

A discussion of the authority of administrative rulemakers is beyond the scope of this paper, but for some of the general rules, see Davis, Administrative Law Treatise, sec. 7:8 (2d ed. 1979), quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

For a particularly exuberant application of the general rules to a relevant case, see Univ. of Richmond v. Bell, 543 F.Supp. 321, 330 (1982) (invalidity of Title IX regulations).

See, also, Cooper, Administrative Agencies and the Courts, 294-297 (1951) (regulations are invalid if they exceed conferred authority, conflict with the statute, extend or modify the statute, have no reasonable relationship to the statutory purpose, or violate due process of law).

But see, Guardians Assn. v. Civil Service Comm. of the City of New York, — U.S. —, 103 S. Ct. 3221 (1983) in which five justices upheld disparate impact regulations under Title VI although three of those justices found that proof of discriminatory intent is required by the statute itself. For divergent views on regulatory authority under Congressional grants of power, see the Guardians Assn. opinions of Justice O'Connor (concurring) and Justice Stevens (dissenting).

If we get a new statute, we are also likely to get new regulations. And new regulations will extend the new statute as the old regulations extended the old statute.

V. THE KEY DIFFERENCES BETWEEN CURRENT REGULATORY DEFINITIONS OF "RECIPIENT" AND THE PROPOSAL IN S. 2568

The language of S. 2568 is "modeled on the definition currently contained in the regulations issued under these [four] laws." "Joint Explanation," supra. S. 2568's definition is "modeled" on the regulations, but it is not identical to them (as I have heard some people say). Indeed, the regulations themselves differ so it would be impossible for S. 2568 to use one definition of "recipient"—as it does—and be identical to differing regulations.

S. 2568 takes regulatory definitions and makes them statutory. This action alone is not without juridical effect (see Part IV). But S. 2568 also changes the regulatory definitions, raising doubts about the intended effect of S. 2568: If S. 2568 is intended to do no more than return us to the status quo ante, why is the definition of "recipient" being changed? This question is at the heart of the controversy over S. 2568.

The material differences between the current definitions and the proposed definition are considered in this section. A side-by-side comparison of the definition of "recipient" as found in the current law and regulations and in S. 2568 can be seen in Appendix A. (Throughout this letter the regulations referred to are always those of the Department of Health and Human Services (HHS) or the Department of Education (ED) unless otherwise indicated. However, all federal agencies that provide federal financial assistance are responsible for enforcing nondiscrimination requirements and many have issued regulations.)

A. Deleting "Program or Activity"

In each of the four statutes, "program or activity" will be changed to "recipient." This single action does not by itself change the definition of "recipient," but it does change the context in which the word is found. Since words are often construed by reference to their contexts, we can expect this change, which at first glance seems not to be definitional, to affect the word's meaning:

> The first thing one has to do . . . in construing words . . . is not to take those words in vacuo, so to speak, and attribute to them what is sometimes called their natural and ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. The method of construing statutes that I prefer is not to take particular words and attribute to them a sort of prima facie meaning which you may have to displace or modify. It is to read the statute as a whole and ask oneself the question: "In this state, in this context, relating to this subject-matter, what is the true meaning of the word?"

Re Bidie, Ct. of App., 2 All E.R. 995, —— (1948).

B. Omitting "Ultimate Beneficiaries"

The three H.H.S. regulatory definitions, but not ED's definition, exclude from the meaning of "recipient" the "ultimate beneficiary of the assistance" (ADA and Sec. 504) and "any ultimate beneficiary under any such program" (Title VI). S. 2568 omits this phrase.

I do not believe the omission is anywhere explained.

Does the omission mean that under S. 2568 "ultimate beneficiaries" will be included within the definition of "recipient" and prohibited from discriminating? An "ultimate beneficiary" is a tenant paying a landlord with public assistance funds or a person buying a shirt with a Social Security check. *Cf*, "Joint Explanation," *supra*.

Regarding the meaning of "ultimate beneficiaries," the courts have said, "There are clear congressional statements that discrimination on the grounds of race, color, national origin or handicap against the ultimate beneficiaries of federal financial assistance is unlawful." *N.A.A.C.P. v. Wilmington Medical Center*, 453 F. Supp. 330, 339 (D.Del.1978), *rev'd on other grounds*, 599 F. 2d 1247 (3rd Cir.1979). The footnote to the quoted sentence cites the H.H.S. regulations and says, "An 'ultimate beneficiary' is not to be confused with a 'recipient'." *Id*, at n. 34.

"The 'ultimate beneficiary' of federal financial assistance within the meaning of Section 504, and the . . . regulations promulgated thereunder, is the intended class of beneficiaries under the Section, handicapped individuals." *Nodleman v. Aero*

Mexico, 528 F. Supp. 475, 489 n. 21 (C.D.Calif.1981) (handicapped person, not airline, is "ultimate beneficiary" of federal aid to airports). See also, United States v. Baylor U. Medical Center, 564 F. Supp. 1495, 1498 (N.D.Tex.1983) (eligible Medicaid and Medicare patients, not hospital, are "ultimate recipients").

Three of the four sets of regulations have made it clear that ultimate beneficiaries, i.e., the intended class of beneficiaries, were not to be regulated. But S. 2568, which is "modeled" on the regulations, does not exlude the classes of intended beneficiaries. Does this mean they are included?

This is the kind of question that has raised serious doubts about the meaning of S. 2568.

(See also, subpart D, infra, receiving federal financial assistance "directly or through another entity or a person.")

C. Incorporating the "Trickle Up Theory"

Under past practice, a "recipient" was any entity that received federal financial assistance either "directly or through another recipient." S. 2568 will expand this definition such that "recipient" will mean any entity receiving direct or indirect assistance "or which receives support from the extension of Federal financial assistance to any of its subunits."

Under past practice, subunits have been covered whenever the main recipient has received federal financial assistance. S. 2568 will maintain that practice (albeit enlarging the coverage from programatic to institutional) and cover the main recipient whenever any subunit receives federal financial assistance.

The implications of this change can be seen in cases such as Miller v. Abilene Christian U. of Dallas, 517 F. Supp. 437 (N.D.Tex.1981), which is discussed in greater detail below. Miller asked whether the Dallas campus of a private university was covered under Section 504 when it had received no federal funds but the Abilene campus had. Miller's answer was "no."

The "trickle up theory" of S. 2568 may produce an opposite answer.

D. Redefining "Indirect Recipients"

In the cases that follow, no concept is more important than "indirect aid." Indirect aid is what goes to indirect recipients, and the new definition for "indirect recipient" will perhaps broaden the definition of indirect aid.

Currently, a "recipient" will receive federal financial assistance "directly or through another recipient." Under the bill, "recipients" will receive federal financial assistance "directly or through another entity or a person." Since an entity is anything that exists, the possibilities for expansive interpretations are endless.

Judges have been asked to draw lines between direct and indirect aid, between direct and indirect recipients. In the cases that follow, judges have answered with remarkable skill. They have held that a baseball team is not a recipient merely because it leases a stadium from a city that is. They have held that an airline is not a recipient although the federal government pays for air traffic controllers and airport improvements. Such questions will be problematic indeed if S. 2568 is enacted.

E. Omitting "Persons"

Under current regulations, "persons" receiving federal financial assistance are covered by nondiscrimination rules; under S. 2568 they are not. This omission seems incongruous.

> . . . The absence of the word "person" from the definition of recipient could reduce the scope of coverage of the statute. If a person, not incorporated as a business or as another entity, and entirely unconnected with a recipient as defined by the bill, receives federal financial assistance to conduct activities, those activities presumably are not covered by the bill. Because so much federal aid is provided to entities falling within the bill's definition of "recipient," this omission may not have very much practical significance. Congressional intent with respect to such "persons" receiving federal aid, however, should be clear.

Testimony of Linda Chavez, Staff Director of the U.S. Commission on Civil Rights, before the Subcomm. on the Constitution of the Senate Judiciary Comm., 98th Cong. 2d Sess. 4-5 (May 30, 1984) (mimeo).

It may be that this omission has something to do with the issue of "ultimate beneficiaries," outlined in subpart B, supra. If so, the connection is obscure.

Or it may be that the omission has something to do with the Soberal-Perez cases. Soberal-Perez v. Schweiker, 549 F. Supp. 1164 (E.D.N.Y.1982), aff'd Soberal-Perez v. Heckler, 717 F. 2d 36 (2d Cir.1983) (Title VI does not cover direct federal aid programs such as Social Security).

It may be that the omission concerns something else. Or it may be that it concerns nothing at all.

VI. IMPLICATIONS OF S. 2568 FOR TEN AREAS OF THE PRIVATE SECTOR

Recent decisions under Section 504, the ADA, Title VI, and Title IX are reviewed in this Part in order to understand the changes that might occur after passage of S. 2568. This review concentrates on cases dealing with the definition of "recipient" because S. 2568's primary effect is to change the meaning and operation of that word. As might be expected, several other issues also appear in the cases.

Nearly all of the following cases arise under Section 504. The great bulk of litigation in the relevant areas (Who is a recipient? What is federal financial aid?) is taking place under Section 504.

There is an interrelationship between the definitions of "federal financial assistance" and "recipient". Under the statutes, and the regulations, coverage is extended to agencies and institutions which receive federal financial assistance, directly or indirectly. Therefore, coverage can be enlarged by redefining _either_ agencies and institutions _or_ federal financial assistance _or_ indirect aid, or by using any combination of redefinitions. For example, in _Angel v. Pan American Airlines_, _infra_, the court was asked to find that Pan American was a "recipient of federal financial assistance" because it benefits from federally-employed air traffic controllers and other federal aid. The court answered the question in the negative. An opposite result would have been reached if _either_ federal aid were redefined to include the undeniable benefits obtained by airlines from air traffic controllers _or_ recipients were redefined as agencies or institutions which do not receive direct federal grants but which do benefit from indirect federal expenditures which, for example, constitute unique aid to an identifiable industry. The interplay among these definitions can be seen throughout the cases.

Two regulatory definitions of "federal financial assistance" can be seen in Appendix B.

A majority of the holdings in the following cases probably would have been impossible, or at least highly unlikely, had the cases been decided under the statutory language of S. 2568. The holdings in the remaining cases are less likely to have been changed by S. 2568, but the bill will change the development of the law even in these areas. If I am right about the potential effects of S. 2568 on these cases, then the bill's impact on the private sector will be vast.

A. Professional Societies
Bachman v. Am. Soc'y of Clinical Pathologists
577 F. Supp. 1257 (D.N.J.1983)

The Society is a non-profit medical society organized under the laws of Illinois. The Society's Board of Registry periodically gives an examination to those candidates who have completed the educational requirements established by the Board. Successful candidates are certified by the Board. Certificates must be renewed annually.

Bachman sought certification as a medical technologist. She requested a reader and extra time for the examination because of her dyslexia which made reading difficult. The Board denied her request.

Bachman sued the Society alleging a violation of Section 504. In 1977 and 1978 the Society had received two federal grants to conduct seminars on alcohol abuse, and to publish the proceedings. The grants came during the time that Bachman complained of discrimination.

The court held that "past recipients of federal financial assistance . . . are liable for violations of the Rehabilitation Act which occurred during the time that they were recipients." Id. at 1262.

The court also found that the Society was a "recipient of federal financial assistance," but that the program which allegedly discriminated against Bachman was not in any way related to the program receiving federal funds. Even in the face of the Third Circuit's decision in Grove City (the entire institution is the program or activity), the Bachman court held that the seminar funds did not constitute institutional aid because "the federal grants were directly awarded for and applied to specific activities of [the Society] and were not used generally to support the organization." Id. at 1263.

The court emphasized that the grants were earmarked for certain purposes, that those purposes were unrelated to the alleged discrimination, and that Section 504 was program-specific.

S. 2568, which would apply Section 504 to the organization as a whole, would probably overturn Bachman.

(The Bachman court also refused to define tax exempt status as indirect federal financial assistance within the meaning of the regulations. Id. at 1263-65.)

See also, Nat'l Collegiate Athletic Ass'n v. Califano, 444 F.

Supp. 425, 430-31 (1978), rev'd, 622 F. 2d 1382 (1980) (private athletic association).

B. Private Education

Miller v. Abilene Christian Univ. of Dallas
517 F. Supp. 437 (N.D.Tex.1981)

Miller claimed that his employment with the University's Dallas campus was ended in violation of Section 504. The University enrolled students who received various federal grants and loans, but neither Miller's department nor the Dallas campus received any direct federal aid. (The University's Abilene campus had received six federal grants for biology research, math training and social work.)

The Court held,

> . . . Miller has failed to allege or raise an issue of fact that would establish that he was a participant in a program or an intended beneficiary of a program or activity that receives federal assistance. [F]ederal funds were not used to employ Miller. Nor does he allege that the discriminatory employment practices allegedly directed at him (a non-beneficiary) affected any participants in or beneficiaries of the federal assistance.

Id. at 439.

The Miller court rejected the argument that federal funds in one part of an institution "free up" funds for use elsewhere. Cf, id. at 440 with Grove City Coll. v. Bell, supra at 1221.

S. 2568's institution-wide coverage and the "trickle up theory" implied by S. 2568's language would make a holding like Miller's unlikely after the bill's enactment.

CAUTION: The result in Miller, and all other Section 504 employment cases, will be affected by Consolidated Rail Corp. v. Darrone, — U.S. —, 104 S. Ct. 1248 (1984), which held that in Section 504 employment suits the federal financial assistance need not have been provided for the primary purpose of providing employment. Still, Darrone seems less likely than S. 2568 to reverse Miller.

See, also, Garrity v. Gallen, 522 F. Supp. 171 (1981) (defining the "recipient" of federal aid as the public school which housed the federally aided program, not the entire school system) and Ferris v. Univ. of Texas at Austin, 558 F. Supp. 536 (W.D.Tex.1983) (public university which received federal aid, but not its shuttle bus system which did not, was a "program" within the meaning of Section 504).

Private sector educators have raised an alarm about S. 2568. For example, Bruce C. Hafen, President of Ricks College and the American Association of Presidents of Independent Colleges and Universities; George Roche, President of Hillsdale College; and Charles S. MacKenzie, President of Grove City College have all testified against the measure. (The educators have been primarily, but not exclusively, interested in Title IX.) See, also, Oaks, "A Private University Looks at Government Regulation," 4 Jn. Coll. & Univ. Law 1 (1976).

Considering that Title IX regulations control such decisions as abortion coverage under school-provided health plans, whether a school can have separate men's and women's athletic teams, and, until recently (47 Fed. Reg. 32526 [July 28, 1982]), student dress codes, it is not surprising that private educators are showing such interest in the bill.

C. Manufacturing
Simpson v. Reynolds Metals Co.
(629 F. 2d 1226 (7th Cir.1980)

Simpson worked at a Reynolds plant in McCook, Illinois. Simpson admits that he has an alcoholism problem that dates back to 1948. The problem was known to Reynolds.

Simpson was suspended for missing three days of work because of his drinking. He was conditionally reinstated after he reached an agreement with his employer. The agreement required Simpson to regularly attend Alcoholics Anonymous meetings and specified that any future unexcused absences would be cause for dismissal.

Plaintiff was again absent for three days because of his alcoholism and Reynolds suspended him. Simpson appealed the suspension but lost his appeal and was discharged. He sued under Section 504.

Reynolds maintained that it was not a recipient of federal financial assistance. However, Reynolds has entered into procurement contracts with the federal government and the company operates certain apprenticeship or on-the-job training programs at its McCook plant with federal funds. (Simpson was never a participant in these OJT programs.) Reynolds further said that the OJT program did not provide a benefit to it, but are benefits to the trainees. Reynolds stated that it has followed a strict policy of refusing federal financial assistance because of "the onerous reporting requirements accompanying such federal assistance." Id. at 1229.

Simpson asked the court to embrace what he called a "unified entity approach" in defining what constitutes "the program or activity receiving Federal financial assistance." Under the "unified entity approach," "once some part of an entity becomes involved in a program or activity receiving federal financial assistance, the employment practices of the entire institution would be subject to the coverage of Section 504." Id. at 1233 n. 12. The court rejected the "unified entity approach," an approach that sounds remarkably like the approach of S. 2568.

The court sustained the dismissal of the action against Reynolds because the plaintiff had failed to show a connection (a nexus) between his discharge and the federal assistance. Id. at 1232. Therefore, the court did not reach the question of whether the OJT programs or procurement contracts constitute federal financial assistance. Presumably, this obstacle has now been removed, Consolidated Rail Corp. v. Darrone, supra, and a court will have to reach the question of "recipient." S. 2568 will likely remove any additional obstacles.

Reynolds Metals shows that S. 2568 may have the unintended effect of decreasing opportunities for the very populations it seeks to serve. On the basis of the Reynolds Metals evidence, it appears that the company will not participate in OJT programs if such programs make the company a "recipient of Federal financial assistance."

D. Professional Sports
Disabled in Action v. Mayor & City Council of Baltimore
685 F. 2d 881 (4th Cir.1982)

The City of Baltimore and the Baltimore Baseball Club (the Orioles) were sued by certain disabled persons for failing to make modifications in Memorial Stadium. The Orioles are the primary lessee of the stadium. The modifications affected seating, ramps, parking, restroom facilities, drinking fountains and telephone booths.

The parties reached a negotiated settlement with the Maryland Commission on Human Relations. All issues were settled before the commission save one: attorneys fees. The federal courts had to resolve that issue.

Defendants sought attorneys fees from the City and the Club, claiming that the Orioles were an indirect recipient of federal financial assistance under Section 504, and the district court agreed:

> The court concludes that defendant Club is included within the scope of [Section 504], as amplified by the applicable regulations, with respect to some, at least, of the facilities in question in this case. While defendant City is a direct recipient of federal financial assistance, defendant Club is an immediate

> indirect beneficiary of the assistance received by defendant City. The regulations state that the federal financial assistance can be received "directly or through another recipient." It is clear that since the Club is the major tenant of the Stadium it is the greatest and most immediate beneficiary of federal aid given to the City which is used for Stadium improvement. Therefore, defendant Club is included within the scope of [Section 504].

Disabled in Action v. Mayor & City Council of Baltimore, civil no. T-79-1749, at 15 (D.Md., July 14, 1981).

The Orioles are not, of course, the exclusive lessee of the stadium. (In happier times the Colts used it.) The stadium is used for other activities, public and private. Are only "major tenants" such as the Orioles "indirect recipients"? Or are other tenants "indirect recipients," too?

For now, the question is academic because the court of appeals reversed the district court.

> [I]t is plain that the City is no mere conduit of federal assistance to the Club. [T]he benefits of federal assistance have accrued both to the direct recipient . . . and to another entity . . . which shares in those benefits by virtue of business dealings with the direct recipient. If the Rehabilitation Act extends to such indirect beneficiaries of federal largesse, consistency would demand that it apply to every customer of every enterprise subsidized by the federal government. Nothing in the language or legislative history of the Act indicates a congressional intention to reach so far.

685 F. 2d, at 884-85.

Conversely, the language of S. 2568, which perhaps will be the language of a new statute, indicates that a recipient is a "private . . . organization . . . to which Federal financial assistance is extended (directly or through another entity . . .)." And while it is unlikely that S. 2568 will be construed to "apply to every customer of every enterprise subsidized by the federal government," it does not seem unlikely that it will be extended to lessees or "major tenants," for example.

E. Transportation

Angel v. Pan American World Airways

519 F. Supp. 1173 (D.D.C.1981)

Angel sued Pan American when the airline refused to transport Mr. Angel, who has cerebral palsy and is confined to a wheelchair, from Germany to the United States because he was not accompanied by an attendant.

The complaint stated three causes of action including a violation of Section 504. The airline maintained that it had not received direct federal financial assistance since 1956 when it received a mail-related subsidy.

Plaintiff claimed that Pan American receives numerous indirect federal subsidies which are sufficient to trigger the prohibitions of the Act. These indirect subsidies include air traffic controllers provided by the Federal Aviation Administration, airports constructed with the aid of federal funds, and certain technical assistance.

The court held:

> . . . Subsidies to airports, to be sure, subject those locales to the broad proscription of Section 504, but this does not translate into binding law upon the users of the airports, whether they be commercial airlines or individual passengers. To hold that commercial airlines fall within Section 504 merely because of assistance provided to airports would expand improperly the accepted proposition that Section 504 is limited to direct recipients of federal funds.

Id. at 1178 (emphasis added) (citations omitted).

Of course, the current regulations implementing section 504 do not restrict its application to direct recipients. And S. 2568, which is "modeled" on the current regulations, does not restrict the definition to direct recipients, either. In fact, S. 2568 expressly includes indirect recipients.

See also, Nodleman v. Aero Mexico, 528 F. Supp. 475, 488-89 (C.D.Cal.1981).

Insofar as BEOGs and Title IX are concerned, Grove City has denied any distinction between direct and indirect aid. 104 S. Ct., at 1217. This is not the same as denying a distinction between direct and indirect beneficiaries.

F. Food Processing

Rogers v. Frito-Lay, Inc.
433 F. Supp. 200 (N.D.Tex.1977),
aff'd 611 F. 2d 1074 (5th Cir.1980),
cert. denied, 499 U.S. 889 (1980)

A handicapped former employee brought suit against Frito-Lay alleging that her termination had been in violation of Section 504. Frito-Lay is a government contractor.

The district court held that the company was not a "recipient" of federal financial assistance because "[t]he term 'federal financial assistance' as used in [Section 504] does not comprehend government procurement contracts but rather refers to the form of grant assistance that goes primarily to public entities." 433 F. Supp., at 204.

The court of appeals affirmed on other grounds.

Government procurement contracts are treated more thoroughly in the next case.

G. Automobile Rentals

Cook v. Budget Rent-A-Car Corp.

502 F. Supp. 494 (S.D.N.Y.1980)

Cook is handicapped, but says that his impairment does not affect his ability to drive. He has been a licensed driver since 1970. A franchisee of Budget Rent-A-Car refused to rent Cook an automobile, allegedly because of Cook's handicap. Cook sued under Section 504.

Budget receives federal funds only through rental contracts that it has with five federal agencies. The contracts for Budget's goods and services are negotiated at fair market value. Plaintiff alleges that these payments make Budget a "recipient" within the meaning of Section 504.

The court conducted a thorough inquiry into the language, and history of Section 504 and its regulations and concluded that procurement contracts do not constitute federal financial assistance within the meaning of the Act. The regulations explicitly exclude procurement contracts and the court relied heavily on this interpretive aid.

Said the court:

> As the Court reads the DHEW regulation, Budget's government contracts do no constitute "Federal financial assistance." Budget's agreements with federal departments and agencies are undoubtedly "contracts" within the meaning of the regulation. There is no need to decide what the regulation means by the term "procurement contract." The regulation makes it clear that the important question is whether Budget's contracts are arrangements by which the government "provides or otherwise makes available assistance" to Budget. "Assistance" is the crucial word, and is explained by the regulation in a manner which is most illuminating with respect to the present controversy. The regulation says that assistance can include a lease of government property for less than

> its fair market rental valued. [Citation.] Plainly, the inference to be drawn is that assistance does not include transactions where government property is leased for an amount equivalent to its fair market rental value. Since there is no "assistance" under the regulation where the government lets property at its fair market rental value, it is plain to the Court that there is no "assistance" where the government hires property at its fair market rental value. In view of the fact that the instant case is precisely one where the government merely hires property from Budget at its fair market rental value, Budget is not a recipient of Federal financial assistance under the DHEW regulation.

Id. at 497-98 (footnotes omitted).

Budget Rent-A-Car is one of the few cases where the regulations are relied on to exclude a transaction.

In future cases similar to *Budget*, the outcome will probably depend on new regulations, if any, issued under authority of S. 2568.

H. Medical Insurance

Bernard B. v. Blue Cross & Blue Shield
528 F. Supp. 125 (1981),
aff'd mem., 679 F. 2d 7 (2nd Cir.1982)

Bernard B. and his wife Shirley B. were covered by Blue Cross health insurance as a fringe benefit of the husband's employment. The insurance did not cover psychiatric care in a government hospital. When Shirley B. was admitted to a government hospital for psychiatric treatment, Blue Cross refused to pay her bills which were substantial.

Mr. and Mrs. B. sued Blue Cross, alleging that the failure of the insurance company to cover such psychiatric care was a violation of Section 504. Blue Cross receives Medicare, Part A funds.

Blue Cross had requested permission to include such psychiatric coverage in its contracts, but the request was denied by the Superintendent of the New York State Insurance Department who explained his decision as follows:

> Serious questions arise as to whether community-rated subscribers should be forced to shoulder these additional burdens [for expanded maternity benefits, psychiatric coverage, and hemophiliac care] when the cost of all necessities, including health insurance, has already placed a severe strain on subscribers with low and medium incomes. The problem is further complicated by the fact that there are many other important and beneficial types of medical care that are

> not now covered by Blue Cross. [Alcoholism treatment and pre-natal care are cited in a footnote.] Since the existing source of available financial resources--the consumer's pocketbook--is not limitless, priorities must be established. . . .

528 F. Supp., at 128 n. 7.

There is a tendency to think that only civil rights plaintiffs act in the interests of the underprivileged. Here, of course, and elsewhere, the very action of which the plaintiffs complain was taken to protect the interests of low and medium income subscribers.

Blue Cross moved for summary judgment on the ground that it was not a recipient. On this ground, the motion was denied.

Said the court:

> We cannot say that Blue Cross has established that no genuine issues of material fact remain on this point and that it is entitled to judgment as a matter of law. Blue Cross acts as a conduit for Medicare funds, performing various functions and ultimately distributing the funds. Blue Cross additionally receives payment for administrative expenses. Plaintiffs have raised a genuine issue of material fact concerning the intermingling of Medicare and other Blue Cross funds and lumping of expenses such that federal Medicare funds may play a part in enabling Blue Cross to carry on both Medicare and non-Medicare activities. . . .

Id. at 132.

Cf, United States v. Baylor Univ. Medical Center, 564 F. Supp. 1495 (N.D.Tex.1983) (Medicare and Medicaid funds to a university hospital constitute federal financial aid not excluded by the "contracts of insurance" exemption in the statute).

Blue Cross did win summary judgment on the ground that what it had done was not "discrimination." The court said, "Reasons other than handicap account for the exclusion of the risk[,]" and the exclusion was "substantially justified." 525 F. Supp., at 132.

The court did not have to find that Blue Cross was a recipient to resolve the issues in the case. But in a future case, the court will have to say whether an insurer that receives Medicare funds is a "recipient." S. 2568 is more likely to make the answer "yes."

(For a comment on the treatment of Medicare, Parts A and B under the Age Discrimination Act, see Schuck, "The Graying of Civil Rights Law: The Age Discrimination Act of 1975," 89 Yale L. J. 27, 59 n. 165 (1979).)

I. Broadcasting
Gottfried v. Federal Communications Comm'n
655 F. 2d 297 (D.C.Cir.1981)
rev'd in part, sub nom.,
Community Television of S. Calif. v. Gottfried
— U.S. —, 103 S. Ct. 885 (1983)

Gottfried is hearing impaired. She petitioned the Federal Communications Commission to deny the license renewal applications of eight Los Angeles area television stations. (Seven commercial licensees and one public station.) Gottfried said that the stations had failed to meet the needs of the hearing impaired and, "as recipients of valuable federal licenses, had failed to satisfy obligations imposed on them by Section 504." The Commission denied her petitions and Gottfried appealed to the circuit court.

The court concluded that Section 504 applied to the public station, and remanded that issue to the FCC for an appropriate remedy. Section 504 was held not to apply to the commercial stations "[a]lthough the Commission may still be obliged to weigh the national policy of [Section 504] within the pubic interest standard. . . ." 655 F. 2d., at 305.

Said the court:

> Section 504 directly imposes legal obligations only on recipients of "Federal financial assistance." Appellants correctly argue that a license to broadcast on the public airwaves is a commodity of great value. But this does not resolve the question of congressional intent: Did Congress intend broadcast licenses to count as "financial assistance" within the meaning of Section 504? We are unable to conclude that it did.

Id. at 312 (footnote omitted).

In the footnote which is omitted, the court refers to the value of a broadcast license in Los Angeles, the country's most profitable market. (In 1964, it was estimated that the value of an average VHF license was $1.5 million.) The court also quotes Justice Brennan (in dissent), that a free license is functionally equivalent to "Government subsidization of broadcasters." Id. n. 55.

Gottfried will probably be limited to its facts, i.e., broadcasting licenses. Cf. Hafer v. Temple University, 524 F. Supp. 531, 540 n. 12 (1981) (Gottfried "not relevant" to a Title IX athletic department case).

Over the objections of two of its members, the Supreme Court reversed in part, holding that Section 504 does not require a public television station's license renewal application to be judged under a different standard than applies to commercial licensees.

J. Agriculture

> As a general rule, Farm Bureau has not become involved in civil rights legislation. However, we are concerned that the broad, vague, and all-encompassing language contained in S. 2568, particularly in the definition of "recipient" of federal financial assistance, may be an open invitation to the federal bureaucracy and the courts to bring virtually every public activity at all levels of government under the jurisdiction of the several statutes that would be amended by this legislation.
>
> [T]he language in the bill may be interpreted to bring under the regulation of civil rights statutes a large portion of all private sector activity. Even individual farmers and ranchers who are recipients of various forms of public assistance or who "receive support" from government programs may be affected.
>
> . . . The broad language in this bill raises questions as to what impact anti-discrimination regulations would have on such benefits as loan guarantees, commodity loans and price support payments.

Statement of the American Farm Bureau Federation before the Senate Comm. on Agriculture regarding S. 2568, 98th Cong., 2d Sess. 1-2 (June 12, 1984) (mimeo).

VII. CONCLUSION

Notwithstanding the length of this letter, this analysis has been very narrow. After presenting some of the background of Grove City and S. 2568, we looked at a very small group of cases, namely those that dealt with the meaning of "recipient of federal financial assistance" and that had private sector defendants and in which the defendants prevailed. These particular defendants prevailed in these particular cases, but would they have prevailed under S. 2568? This question provides a useful approach to an understanding of S. 2568.

The nine cases in Part VI showed applicants, employees, sports fans, travelers, renters, insured persons, and television viewers suing professional societies, employers (including universities), Orioles, common carriers, franchisors, insurance companies and federal licensees for readers and extra test time, jobs, handicapped seating and airplane seats, cars, particular health insurance coverage, and captioned televison. The defendants were said to be "recipients of Federal financial assistance" because they had unrelated grants, aid at another campus, OJT programs, a stadium lease from a city, airport construction aid and air traffic controllers, procurement contracts, Medicare, and broadcast licenses. Congress is now being asked to readjust the laws that governed those cases.

The civil rights statutes are pervasive (they were intended to be), and they reach deep into the private sector. S. 2568 will extend their reach. This letter has attempted to show how, and how far, that reach might be extended.

Sincerely,

Lincoln C. Oliphant

Lincoln C. Oliphant,
Counsel*

*I wish to thank Katherine B. Smith of the Oklahoma City University School of Law and Michael A. Rosenauer of the Willamette University College of Law for their research assistance.

Appendices attached

TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Present Statutory Language*	Present Regulation Definition	Proposed Definition - S. 2568 98th Congress 2D Session
42 U.S.C. § 2000d (1982) Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.	45 C.F.R. § 80.13(i) (1983) The term "recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program. [Department of Health and Human Services regulations]	Sec. 5(c "For the purpose of this title, the term 'recipient' means — (1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and (2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit, to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Present Statutory Language	Present Regulation Definition	Proposed Definition - S. 2568,
20 U.S.C. § 1681 (1982)	34 C.F.R. § 106.2 (h) (1983)	Sec. 2(b) 98th Congress 2D Session
(a) Prohibition against discrimination; exceptions No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . . (c) "Educational institution" defined For the purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.	(h) "Recipient" means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof. [Department of Education regulations]	"For the purpose of this title, the term 'recipient' means — (A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and (B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of such subunit, to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."

SECTION 504 OF THE REHABILITATION ACT OF 1973

Present Statutory Language	Present Regulation Definition	Proposed Definition - S. 2568
29 U.S.C. § 794 (1982) Nondiscrimination under Federal grants and programs; promulgation of rules and regulations No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. * * *	45 C.F.R. § 84.3(f) (1983) (f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee or a recipient, but excluding the ultimate beneficiary of the assistance. [Department of Health and Human Services regulations]	98th Congress 2D Session Sec. 3 (b) "For the purpose of this section, the term 'recipient' means — (1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and (2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit, to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."

THE AGE DISCRIMINATION ACT OF 1975

Present Statutory Language	Present Regulation Definition	Proposed Definition - S. 2568
The Age Discrimination Act of 1975, Pub. L. 94-135, title III, § 301 et seq., (Nov. 28, 1975), 89 Stat. 728 as amended by Pub. L. 95-478, title IV, § 401(a), (Oct. 18, 1978), 92 Stat. 1555. § 302 Statement of Purpose It is the purpose of this title to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance, including programs or activities receiving funds under the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221 et seq.). [see note.] § 303 Prohibition of discrimination Pursuant to regulations prescribed under section 304, and except as provided by section 304(b) and section 304(c), no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance. [Note: In the codification, at 42 U.S.C. § 6101 et seq. (1982), "Chapter 67 of title 31" was substituted for "the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221 et seq.)" on authority of Pub. L. 97-258, § 4(b), (Sept. 13, 1982), 96 Stat. 1067.]	45 C.F.R. § 90.4 (1983) "Recipient" means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended, directly, or through another recipient. Recipient includes any successor, assignee, or transferee, but excludes the ultimate beneficiary of the assistance. [Department of Health and Human Services regulations]	Sec. 4(e) 98th Congress 2D Session "[T]he term 'recipient' means — (A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and (B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit, to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."

"Federal Financial Assistance" as defined in regulations

45 C.F.R. § 84.3(h) (1983)

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

[Department of Health and Human Services regulations implimenting Section 504 of the Rehabilitation Act of 1973]

34 C.F.R. § 106.2(g) (1983)

(g) *"Federal financial assistance"* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

[Department of Education regulations implimenting Title IX of the Education Amendments of 1972]

DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20250

June 20 1984

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

On May 29, 1984, you wrote to me requesting comments on the manner in which S. 2568, entitled the "Civil Rights Act of 1984," would affect the administration of this Department's programs, and on the enforcement aspects of the measure as well. S. 2568 has been introduced in response to the Supreme Court's decision in Grove City College v. Bell, 104 S. Ct. 1211 (1984).

As indicated by Daniel Oliver, General Counsel of this Department, in his letter of June 8, 1984, to the Honorable Jesse Helms and in his testimony before the Senate Committee on Agriculture, Nutrition, and Forestry on June 12, 1984, the Department of Agriculture is committed to vigorous enforcement of Federal civil rights laws. However, we are concerned that if S. 2568 is enacted in its present form, it could so broaden the reach of the Federal laws regarding discrimination that it would make them applicable to over 2,000,000 individual farmers who are recipients of Federal loans and grants under programs administered by this Department.

Currently the anti-discrimination statutes prohibit discrimination in a "program or activity" receiving Federal financial assistance. Also, our regulations exempt "ultimate beneficiaries" from the definition of recipient. S. 2568 would remove the "program or activity" concept from the statute, and would seem to remove the exemption for ultimate beneficiaries. S. 2568 also greatly broadens the definition of recipient. We believe that S. 2568 would very likely effect a major transformation in the Federal anti-discrimination laws by making them applicable to farmers and the people they do business with, and would impose an enormous enforcement burden on this Department.

There are three principal categories of Departmental programs under which we believe recipients would be most directly affected if S. 2568 were enacted: farm price supports loans, loans made by the Farmers Home Administration, and Federal crop insurance programs.

Because farmers who receive Federal price support loans on their commodities are not themselves involved in a "program or activity receiving Federal financial assistance" and because they are ultimate beneficiaries of the programs involved, those farmers are not now deemed to be subject to the Federal anti-discrimination laws. If S. 2568 were to be enacted in its present form, however, we believe that farmers who receive price support loans would come within the reach of those laws. More than 2,000,000 producers received price support loans last year.

Recipients of loans made by the Farmers Home Administration could likewise be covered by Federal anti-discrimination laws if S. 2568 were enacted in its present form. This would include recipients of farm operating loans, farm real estate loans, disaster loans, and loans made for other purposes such as rural housing and business and industry loans. While the anti-discrimination laws do not currently apply to farmers and others who receive loans directly from the Farmers Home Administration, we believe such recipients could be covered by those laws if S. 2568 became law. In fiscal year 1983, approximately 145,000 loans were made directly to such recipients by the Farmers Home Administration.

The situation would be the same for producers receiving assistance in the form of premium subsidies under the Federal crop insurance programs. Like recipients of Federal loans, producers who purchase subsidized crop insurance are not now covered by Federal anti-discrimination laws because they are not involved in a program or activity receiving Federal financial assistance and because they are ultimate beneficiaries as well. If S. 2568 were to become law, however, such producers could be deemed to be "recipients" of Federal financial assistance. We believe this would be true whether they purchased Federal crop insurance directly from the government or from private insurers participating in the government's reinsurance program. Approximately 225,000 producers purchased subsidized crop insurance under these programs in fiscal year 1983, and approximately 328,000 are expected to do so in fiscal year 1984.

Finally, we would note that the reports of the House Education and Labor Committee and the House Judiciary Committee on this legislation, in regard to whether the Food Stamp Program would trigger coverage, state only that the respective committees "[believe] the Supreme Court adequately addressed this issue in the Grove City College ruling," and then quote a footnote in which the Supreme Court simply noted that receipt of food stamps by students does not trigger coverage of the colleges and universities they attend (see page 31 of the Judiciary Committee's report and pages 31-32 of the Education and Labor Committee's report on the Civil Rights Act of 1984). In so doing, we believe the committees are clearly indicating an intention to cover entities whose involvement in the Food Stamp Program is more substantive and direct.

The language of S. 2568 is broad, vague, and clearly ambiguous. How the proposal would affect the American farmers and the people they do business with -- the American farming industry as a whole -- is far from clear. Such a proposal should not be enacted without the fullest consideration. I therefore recommend that S. 2568 be thoroughly considered for its potential effects on millions of beneficiaries of Federal assistance under programs administered by this Department -- as well as by dozens of other Federal agencies.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Richard E. Lyng

Richard E. Lyng
Acting Secretary

499 So. Capitol Street
Suite 101
Washington, DC 20003
(202) 484 7511

THE MORAL MAJORITY, INC.

June 15, 1984

The Honorable Orrin Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

It has come to my attention that your committee is scheduled to hold further hearings on S. 2568, the "Civil Rights Act of 1984." As President of the six million member Moral Majority and Chancellor of Liberty Baptist College, we would like the opportunity to testify concerning S. 2568.

I am opposed to the new enlarged definition of recipient that S. 2568 imposses. This bill grants the federal government control over a wide range of newly expanded areas, going far beyond the pre-Grove City Supreme Court decision.

This bill would adversely affect private colleges and church-related schools whose students are assisted with federal funds. For example, if a seminary does not ordain women or homosexuals, would the entire school be forced to relinquish all federal funds?

Would tax-exemptions given to churches and other charitable organizations be considered federal subsidy, thereby bringing them under the authority of all federal anti-discrimination regulations?

Questions such as these, and many many others, are left unanswered by the ambiguity of S. 2568. It appears that these legislative questions are being left to be answered by the Judiciary, which lacks the constitutional jurisdiction, authority and responsiveness to the people to adequately define the proper constraints.

S. 2568 opens the door for grave entrenchment of religious civil liberties and is a wrongful governmental intervention into private affairs.

Sincerely,

Jerry Falwell

Dr. Jerry Falwell
President Moral Majority

cc: Steve Markman
Ron Docksai

NATIONAL CAPITOL OFFICE • JERRY FALWELL, PRESIDENT
305 SIXTH STREET • LYNCHBURG, VA 24504 • (804) 528 5000

UNITED STATES CATHOLIC CONFERENCE

1312 MASSACHUSETTS AVENUE, N.W. • WASHINGTON, D.C. 20005

MOST REVEREND JAMES W. MALONE, D.D.
BISHOP OF YOUNGSTOWN
President

REVEREND MONSIGNOR DANIEL F. HOYE
General Secretary

REVEREND RONALD C. ANDERSON
REVEREND DONALD E. HEINTSCHEL
MR. FRANCIS X. DOYLE, JR.
Associate General Secretaries

June 11, 1984

Hon. Orrin Hatch, Chairman
Senate Committee on Labor and
  Human Resources
Room 428, Dirksen Office Building
Washington, D. C. 20510

Dear Senator Hatch:

I am writing to express the strong support of the United States Catholic Conference for the principles of non-discrimination incorporated in S. 2568, the Civil Rights Act of 1984. The passage of this legislation is of central significance for it deals with the very heart of the civil rights protections which have been enacted over the last twenty years. These civil rights laws have done a great deal to root out discrimination in our society and to protect the basic rights of millions of Americans. To permit that legacy to be eroded would be a tragic mistake.

The Catholic tradition defines the human person as "the image of God"; each person has a unique dignity which in turn is the basis for a spectrum of human rights, moral claims which protect and promote the dignity of each person in society. In light of the equal dignity each person possesses, discrimination based on race, ethnicity, sex, age or physical condition is a violation of the moral law which in turn should be the foundation of our constitutional and civil laws. Because discrimination is a direct assault on the dignity of the person, the Catholic Church, in cooperation with the other religious communities of our country, has been proud to be part of the struggle for human and civil rights. It is on the basis of both our moral principles and our past experience in the civil rights arena that we address the Civil Rights Act of 1984.

The decision of the Supreme Court in Grove City College v. Bell, 104 S. 1211 (1984), has made it necessary for Congress to amend the four major federal laws prohibiting discrimination by recipients of federal funds. By amending Title VI of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; and the Age Discrimination Act of 1975, the Civil Rights Act of 1984 is consistent with the broad coverage that marked the enforcement of these civil rights laws prior to the Grove City decision.

We wish to address a specific part of S. 2568 which we believe requires clarification. The definition of "recipient" in S. 2568 is unclear and could extend the reach of the four statutes to an organization which itself does not receive federal financial assistance. As defined, a recipient includes any private organization "which receives support from the extension of federal financial assistance to any of its subunits." "Subunit" is not defined, nor is it clear when an organization "receives support from the extension of federal financial assistance." Does the bill contemplate only the situation in which a subunit remits federal financial assistance (e.g., funds) to a parent organization, or does it contemplate as well the situation in which a subunit which receives federal assistance provides support to its parent organization from non-federal sources?

If the latter, it would seem that a diocese which receives support from a parish whose school receives a federal energy conservation grant could be considered a "recipient" even though in fact it (the diocese) receives none of the grant funds. Status as a "recipient" might then be construed as requiring the diocese to comply with various administrative regulations and subjecting it to governmental investigations into its various programs and activities. A diocese which is a corporation sole presents particular concerns. In short, an unnecessarily broad interpretation of the term "recipient" could lead to unwarranted governmental intrusion into the internal affairs of religious organizations. We therefore ask that the definition of recipient in S. 2568 be confined to organizations which actually receive federal financial assistance directly or through any subunit or other source.

Precisely because this legislation deals with human and civil rights we also wish to reiterate here our broader concern with the way in which Title IX regulations require educational institutions receiving federal financial assistance to treat abortion in the same fashion as other temporary disabilities for the purposes of student and employee leave and health policies. We recognize that S. 2568 is not directly concerned with dealing with this larger issue of Title IX, but we wish to be on record repeating our concern about this matter.

In summary, we want the Committee to know of our support for the civil rights intent of S. 2568 and our conviction that the definition of "recipient" requires clarification.

Sincerely yours,

Daniel F. Hoye

Msgr. Daniel F. Hoye
General Secretary

CC: Members of the Senate Committee
on Labor and Human Resources

June 26, 1984

Statement to the Senate Committee on Labor and Human Resources Council, June 26, 1984.

Senator Hatch, I am Norman Wiggins, president of Campbell University. Also, I have in recent years had the privilege of serving as President of the National Association of College and University Attorneys and President of the American Association of Presidents of Independent Colleges and Universities, being the immediate past president of this latter organization. Presently, I serve as president of the North Carolina Baptist State Convention, president-elect of the North Carolina Association of Colleges and Universities, a member of the Board of Directors of the Christian College Coalition, a member of the Judiciary Committee of the National Association of Independent Colleges and Universities, a member of the Education Committee of the Baptist World Alliance, a member of the Legal Affairs Committee of the Education Commission of the Southern Baptist Convention, and a member of the Executive Committee of the North Carolina Association of Independent Colleges and Universities. In this instance, however, I speak only for my university and would at the outset express my appreciation for the privilege of submitting to you and your committee our comments concerning S.2568:

> A bill to clarify the application of Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and Title VI of the Civil Rights Act of 1964.

Campbell University is the third largest university in North Carolina. Annually, including the summer sessions, it serves in excess of 5,000 students. It is one of the seven schools related to the North Carolina Baptist State Convention. It is not and has never been sectarian and is committed to a policy of non-discrimination and equal opportunity for those wishing to enroll as students.

Campbell University receives no direct Federal aid. It does, however, admit students who receive financial aid, both from State and Federal governments. Although the university has borrowed funds for the building of residence halls, it has never received a federal grant for the construction of a building. Other grants received by the university have been in areas of what we would consider as a services rendered contract whereby the university has rendered services in return for receiving Federal funds. Generally, such programs in which we have entered have been for the education of high school teachers and for the updating of basic skills of students whose education did not afford them the opportunity to gain such skills during their elementary and secondary school experiences.

Campbell University has always believed that governmental regulations should be restricted to areas in which the government has a legitimate governmental interest to protect. For example, we believe that such regulations should insure that government funds are expended for the purpose for which they are provided; that they insure that government funds are not expended in any ways which are inimical to legitimate governmental objectives and that such regulations make certain that government property and facilities acquired with government funds or financing are used without unlawful discrimination and in other respects consistent with applicable law. In addition, we believe that laws and regulations affecting education must be written so as to protect and minimize interference with academic freedom of both state and independent colleges and universities and their personnel. Furthermore, we believe that in order to strengthen our pluralistic system, such laws and regulations should distinguish, where appropriate, between publicly sponsored and independently sponsored institutions and that the constitutional freedoms of those independent institutions controlled by churches should always be honored.

We have always believed that government regulations should be limited to the programs directly assisted and that they should be appropriate to both the level and duration of the support provided. Also, we have assumed that the application of government regulations would not be premised upon the receipt of government financial assistance by students. In other words, having refused every form of financial aid other than aid based upon services rendered, we were of the opinion that Federal student aid alone would not make a university "a recipient" of federal funds within the meaning of Title IX. Even if it did, we assumed that only programs supported by Federal funds would be subject to governmental control. The supreme court in the Grove City College case reaffirmed our beliefs.

In the light of the long history of financial aid to students and in the absence of any evidence of discrimination on the part of educational institutions, it seems strange at least and unwise at best for legislation to be adopted which if carried to its logical extreme would encompass almost every institution, every business, and indeed almost every financial activity involving the transfer or exchange of federal funds. So far as we have been able to determine, there is neither any evidence nor any allegation of any discrimination on the campuses of American colleges and universities.

Again, Campbell University has received no direct federal aid in the building of its campus. In order that we might remain independent of government control and pursue our own educational purposes, we have always striven to secure our support from private sources. In so doing, we have assumed that we were serving our government, our students, and our supporters.

In the Grove City College Case, the Supreme Court of the United States held that enrollment of students receiving Federal aid made the college a "recipient" of assistance. The court went on, however, to hold that government regulation would be limited to those "specific programs" receiving Federal support. Although the decision in Grove City came as a surprise and a disappointment, it was generally believed that colleges and universities receiving no direct financial assistance could survive under the "program specific concept." S.2568 is designed, however, to abolish the "program specific concept." The matter of survival for many private colleges is not so clear if the "program specific concept" is abolished.

It seems reasonable to believe that if S.2568 is adopted, it will result in demands for greatly increased support from the Federal government. If government control comes upon the mere receipt of a check from a student receiving financial aid, what incentive will the institution have for continuing to secure funds from private sources?

If S.2568 is adopted, who will pay the costs of the operation of the Title IX compliance office of each institution? It would seem that this would ultimately have to be borne by the Federal government inasmuch as the majority of private institutions do not have sufficient funds to support such additional activity.

In closing, permit me to suggest that inasmuch as Title IX is being re-examined, careful attention should be given to clarifying the language of the present regulations as they relate to religious and moral values. Many believe the regulations presently establish an official orthodoxy about such matters as the role of the sexes in society, attitudes about the institutions of marriage and the family and the matter of sexual morality.

Again, I would urge that no action be taken on S.2568 until there can be a thorough study of its impact on colleges and universities receiving no direct federal assistance.

Thank you for permitting me to enter this statement on the record.

Senator **Grassley**. I will put a statement of my own in the record at the point where opening statements were made.

The meeting is now adjourned.

[Whereupon, at 5:45 p.m., the committee was adjourned.]

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